91-392

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

CITIZENS AGAINST BURLINGTON, INC., WILLIAM REUTER, DANIEL KASCH, CAROL VAUGHAN, AND RICHARD VAN LANDINGHAM III,
Petitioners,

v.

JAMES B. BUSEY IV, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, TOLEDO-LUCAS COUNTY PORT AUTHORITY AND BURLINGTON AIR EXPRESS, INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Did the D.C. Circuit err in rejecting Seventh Circuit precedent and holding that the Federal Aviation Administration has the authority under the National Environmental Policy Act and the Airport and Airway Improvement Act to allow non-federal applicants to define and control the alternatives analyzed in the agency's environmental impact statement?

2. When a federal statute imposes a substantive environmental obligation on a federal agency to ensure that mitigation measures "have been taken" before a project is approved, does the agency have the authority to approve a project and allow it to operate for years based only on a belief that mitigation measures may be analyzed, funded and carried out at some indefinite point in the future?

PARTIES TO THE PROCEEDING

The petitioners in the court of appeals and in this Court are Citizens Against Burlington, Inc., William Reuter, Daniel Kasch, Carol Vaughan, and Richard Van Landingham III. Citizens Against Burlington, Inc. has no parent or subsidiary company.

The respondent in the court of appeals was James B. Busey IV, Administrator of the Federal Aviation Administration. The intervenors supporting respondent in the court of appeals were the Toledo-Lucas County Port Authority and Burlington Air Express, Inc.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 938 F.2d 190 (D.C. Cir. 1991) and appears in the appendix to this petition at App. 1a-46a. The record of decision and order issued by the Federal Aviation Administration are not reported and appear at App. 49a-116a.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1991. App. 47a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2), provides:

> The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall--
>
> * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--
>
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commit-

ments of resources which would be involved in the proposed action should it be implemented.

Section 509(b)(5) of the Airport and Airway Improvement Act (AAIA), 49 U.S.C. App. § 2208(b)(5), provides:

> It is declared to be national policy that airport development projects authorized pursuant to this chapter shall provide for the protection and enhancement of the natural resources and the quality of the environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretary of the Interior and the Administrator of the Environmental Protection Agency with regard to any project included in a project grant application involving airport location, a major runway extension, or runway location which may have a significant impact on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have significant adverse effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all reasonable steps have been taken to minimize such adverse effect.

STATEMENT OF THE CASE

1. Parties. Burlington Air Express (Burlington) is an air cargo express company which uses jet aircraft in a "hub and spoke" delivery system. The Toledo-Lucas County Port Authority (the Port Authority) operates the Toledo Express

Airport in Toledo, Ohio. The Federal Aviation Administration (FAA) reviews and approves Airport Layout Plans under the Airport and Airway Improvement Act (AAIA), 49 U.S.C. App. § 2201, *et seq.* Petitioners are Citizens Against Burlington, Inc., which has over 700 members, and several individuals (hereafter referred to collectively as "CAB"). Most of these persons reside near the Toledo Express Airport.

2. Summary of Proceedings. Burlington asked the Port Authority to help it relocate its hub from Fort Wayne, Indiana to Toledo Express Airport. The Port Authority asked the FAA to approve a revised Airport Layout Plan and provide federal funding to accommodate Burlington's hub operations, which would occur primarily between midnight and 6:00 a.m. In May 1990, the FAA issued a final EIS (FEIS) under the National Environmental Policy Act (NEPA) analyzing this proposal. On July 12, 1990, the FAA issued a Record of Decision (ROD) and order which approved the proposal under several federal statutes, including NEPA and the AAIA.

CAB, which will be adversely affected by increased nighttime noise when Burlington's operations begin, filed a petition for review five days later with the Court of Appeals for the District of Columbia Circuit. CAB contended that the FAA's decision violated Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), Section 4(f) of the Department of Transportation Act (DOT Act), 49 U.S.C. § 303(c), and Section 509(b)(5) of the AAIA, 49 U.S.C. App. § 2208(b)(5). CAB sought an order declaring the FAA's decision to be invalid and enjoining federal funding, construction activities and flight operations to carry out Toledo's revised Airport Layout Plan until the FAA's statutory

violations were corrected.

On August 1, 1990, the court of appeals denied CAB's request for an immediate stay of the FAA's order. On June 14, 1991, the court of appeals affirmed the FAA's decision in all but one respect[1] and declined to grant injunctive relief. CAB now seeks review by this Court of two claims decided against it by the court of appeals: (1) the FAA's failure to analyze Fort Wayne as an alternative site for Burlington's operations, and (2) the FAA's failure to require the Port Authority to complete a noise impact study, to obtain funding for noise mitigation, and to complete the mitigation program before Burlington begins its nighttime cargo flights or by any firm timetable.

3. Burlington's Decision to Relocate. From 1985 to the present, Burlington has operated an air cargo hub at Baer Field in Fort Wayne, Indiana. ROD, p. 1 (App. 50a). Fort Wayne spent $33.67 million on airport improvements to accommodate Burlington's operations. The FAA found in 1987 that those operations had insignificant environmental effects on the Fort Wayne area.

In May 1988, Burlington began discussions with Fort Wayne to establish a permanent hub in Fort Wayne. FEIS, pp. B-93, E-28. However, Fort Wayne did not agree to

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[1] The exception is that the court held that the FAA had violated the regulations of the Council on Environmental Quality by failing to select the consultant that prepared the EIS and by failing to require that consultant to complete a form showing that it had no financial or other interest in the outcome of the project. App. 24a-27a. To remedy this violation, the court ordered the FAA to have the consultant execute a disclosure statement and, if the FAA finds that a conflict exists, to decide on further measures. App. 27a.

Burlington's request to provide financial assistance for improvements at the airport. *Id.* at B-93.

As a result, Burlington began to look for alternative sites for its operations. FEIS, p. 1-2. It selected the Toledo Express Airport in Toledo, Ohio, which is only about 80 miles northeast of Fort Wayne. Burlington did not select Toledo because there was a demand or need for air cargo services in that city. The hub will serve the same customers regardless of whether it is located in Fort Wayne or Toledo.

Burlington selected Toledo primarily because Toledo offered it millions of dollars in local, state and federal funds to locate its hub there. ROD, Att. III, p. 19-20 (App. 123a-124a). These financial incentives were the "important reasons driving this proposal" and were "the one major reason" for Burlington's decision to relocate. *Id.* at 18, 20 (App. 121a, 124a).

4. The FAA's Refusal to Analyze the Fort Wayne Alternative. NEPA and the AAIA each establish a national policy to protect and enhance the nation's environmental quality. 42 U.S.C. § 4331; 49 U.S.C. App. § 2208(b)(5). To carry out this policy, these statutes provide that the FAA must consider the environmental consequences of its actions, including alternatives. 42 U.S.C. § 4332(2)(C); 49 U.S.C. § 2208(b)(5).

In its FEIS and Record of Decision, the FAA refused to consider Baer Field in Fort Wayne as a reasonable alternative to Toledo for Burlington's air cargo hub. FEIS, p. 2-15; ROD, pp. 7-8 (App. 58a-59a). The FAA analyzed only two alternatives in the FEIS: (1) building a new hub in Toledo and (2) no action. FEIS, p. 2-17; ROD, p. 8 (App. 61a).

The FAA also admitted that the FEIS "did not contrast the environmental impacts of continued operations by Burlington at [Fort Wayne] with those of the proposed action." ROD, Att. III, pp. 20-21 (App. 125a).

There are numerous indications that, in making its decision, the FAA blindly accepted Burlington's "Toledo-or-bust" position. The FAA stated that it gave "substantial deference to Burlington's preference to establish a permanent air cargo hub in the Toledo area." FEIS, p. 2-1. Burlington's confidential report on seventeen potential sites for its air cargo hub, including Fort Wayne, was neither given to the FAA nor included in the administrative record. FEIS, pp. E-62 to E-64; ROD, Att. III, p. 22 (App. 128a). Instead, the FEIS simply declares that "Burlington officials have indicated that Fort Wayne is not a permanent alternative." FEIS, p. 2-15.

CAB repeatedly urged the FAA in its public comments to analyze the Fort Wayne alternative. For example, CAB cited a lengthy April 25, 1990 letter from Fort Wayne's airport director to Burlington which described the feasibility of locating a permanent hub in that city. AR 1173, 993.

The FAA admitted in the FEIS that "other sites may be feasible," but refused to investigate them. FEIS, p. C-16. The administrative record does not contain a single communication from the FAA to Fort Wayne requesting information concerning its possible use as an alternative airport.

Instead of investigating the issue, the FAA merely asked Burlington to clarify its position. ROD, p. 30 (App. 95a). In response, Burlington claimed in a June 27, 1990 letter that it had no "existing viable alternative" to Toledo. *Id.* at 31

(App. 95a). In its Record of Decision, the FAA accepted this statement at face value: "Base[d] on this reconfirmation of the findings in the FEIS, the FEIS need not be revised or supplemented to consider Fort Wayne as a reasonable alternative." *Id.*

After the Record of Decision was issued and CAB learned of Burlington's "reconfirmation" letter, CAB obtained a copy of a May 2, 1990 letter[2] from Burlington's chief executive officer in which he told Fort Wayne that "* * * I will look to Fort Wayne for support and solutions as and if our Toledo commitment is altered by any of the risks or uncertainties that lie ahead" and that "I am able to bank your support and you, in turn, can bank on Burlington's responsiveness as and if we find that our circumstances in Toledo change." App. 135a-136a. In short, by Burlington's own admission, Fort Wayne was its backup alternative if its plans for Toledo fell through.

5. Noise Impacts in the Toledo Area. In contrast to the minimal impact Burlington's flights have had in the Fort Wayne area, the project will cause a major change in the noise environment around the Toledo airport. FEIS, p. C-23. The area of significant noise will increase by a factor of four and over 2,000 people in residential areas, nursing homes and a park campground will be affected. *Id.* at 4-22, 4-32, 4-50, C-23, S-4.

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[2] The FAA did not disclose Burlington's June 27 letter to petitioners prior to its July 12 decision. If the FAA can rely on Burlington's self-serving June 27 letter concerning Toledo, petitioners are equally entitled to submit Burlington's undisclosed May 2 letter concerning Ft. Wayne. In addition, the court of appeals did not grant intervenors' request to exclude the May 2 letter from the record. See App. 41a-42a.

More significantly, the increase in noise will occur almost entirely during nighttime hours. Nighttime flights by large jet aircraft will increase from about 400 to over 11,700 flights per year, with 46 new takeoffs and landings five nights a week between midnight and 7 a.m. FEIS, pp. 2-2, 4-4, 4-5, 4-11; ROD, p. 5 (App. 55a). Sleep disturbance is likely to be the most common complaint. FEIS, p. 4-16.

The FAA expects the Port Authority to mitigate some of this noise. The Port Authority plans to buy some homes in the most severely impacted areas. ROD, p. 13 (App. 68a). It also plans to install sound insulation for, or make cash payments to, some homeowners in less severely impacted areas. ROD, p. 13 (App. 69a); FEIS, p. 4-33.

However, at the time of the FAA's decision, the FAA knew that the mitigation program had serious deficiencies. First, the specifics of the program were largely undefined and were to be the subject of a later "Part 150" study.[3] The FAA did not require the Port Authority to complete this study before it approved the project. ROD, p. 14 (App. 69a-70a).

Second, no one knew where the $36 million (or more) to carry out the mitigation programs would come from. The Port Authority wanted to use federal funds, but the FAA stated that "it does not appear that the project could expect to obtain a high enough priority to make it competitive for the limited primary discretionary funds that would be needed." AR 737, p. 2. The Port Authority's only financial

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[3] Part 150 refers to 14 C.F.R. Part 150, which requires airports to identify a program of noise reduction measures and land use controls that will reduce the noise impacts of the airport on surrounding areas.

commitment was a vague one-sentence assurance that it "will take appropriate actions within its powers to implement, with or without federal funds," the mitigation programs. FEIS, p. E-39.

Third, the FAA did not require mitigation to be accomplished before Burlington's flights begin or by any firm timetable. FEIS, pp. S-7, 4-37. In their comments, both the U.S. Environmental Protection Agency and CAB objected that this would mean people could be exposed to significant nighttime noise for years. FEIS, pp. E-53; ROD, Att. III, pp. 30-33 (App. 129a-134a). In response, the FAA merely stated that "it is not reasonable to require substantial completion of the noise mitigation commitments before operations begin." ROD, Att. III, p. 31 (App. 131a).

6. The Court of Appeals' Decision. In its decision, a majority of the court rejected CAB's claim that the FAA violated NEPA by failing to analyze Fort Wayne as an alternative site for Burlington's air cargo hub.[4] The majority agreed that the FAA had not analyzed Fort Wayne. App. 4a-5a. However, the majority held that the FAA complied with NEPA because a federal agency has no duty to analyze any alternatives to a proposal by a private applicant. App. 19a. Dissenting from this holding, Judge Buckley stated that the majority's decision permitted non-federal parties "to define the limits of the EIS inquiry and thus to frustrate one of the principal safeguards of the NEPA process, the

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[4] The majority opinion suggests that CAB advocated building an air cargo hub in Peoria or other cities besides Fort Wayne. App. 17a-18a, n. 7. In fact, CAB contended in the court of appeals that Fort Wayne was the only alternative location that the FAA should have analyzed in its EIS.

mandatory consideration of alternatives." App. 42a-43a.

The court also rejected CAB's claim that the FAA violated its substantive obligation under the AAIA not to approve an airport project unless it first determines that "all reasonable steps have been taken" to mitigate the adverse environmental impacts of the project. The court agreed that this was a substantive requirement, but held that it did not mean that the FAA had to draft or carry out a noise-control plan before Burlington's nighttime flights begin. App. 36a. Instead, it was enough that the FAA required the Port Authority to continue its study of the issue and had "grounds to believe that the plan will be implemented" at an unspecified time in the future.[5] *Id.*

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[5] The court also rejected CAB's claims that the FAA violated NEPA because the EIS inadequately discussed the nighttime noise impacts of the project (App. 20a-24a) and that the FAA violated the DOT Act and the AAIA because it approved a project without adequately evaluating "feasible and prudent" alternatives to, and measures to mitigate adverse impacts of, the project (App. 27a-37a). CAB is only raising these claims on this appeal to the extent that an unexamined but viable alternative which renders an EIS inadequate can also create a violation of Section 4(f) of the DOT Act and Section 2208(b)(5) of the AAIA, which prohibit the FAA from approving a project unless no "feasible and prudent" alternative exists. *See Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 784-785 (9th Cir. 1980).

REASONS FOR GRANTING THE WRIT

I. The D.C. Circuit Erroneously Rejected Seventh Circuit Precedent and Severely Undermined NEPA and the AAIA By Holding that Non-Federal Applicants Can Define and Control the Alternatives Analyzed in a Federal Agency's EIS

The decision below severely undermines the central requirement of the NEPA process--the consideration of alternatives. NEPA requires federal agencies to analyze "alternatives to the proposed action" before they approve major federal actions significantly affecting the environment. 42 U.S.C. § 4332(2)(C). The AAIA, the FAA's organic legislation, is even stronger. It provides that the FAA cannot approve an airport project that has significant environmental effects unless it issues "a finding * * * that no feasible and prudent alternative exists." 49 U.S.C. App. § 2208(b)(5).

According to the CEQ regulations implementing NEPA, the consideration of alternatives forms "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. It is supposed to "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker." *Id.*

The D.C. Circuit held that a federal agency "cannot redefine" the applicant's goals and therefore need only consider two alternatives: the applicant's proposal and no action. App. 19a. As Judge Buckley correctly stated in his dissent, this decision improperly "allows a non-federal party to sort out alternatives based entirely on economic considerations, and then to present its preferred alternative as a take-

it-or-leave-it proposition." App. 45a. As a result, the EIS' discussion of reasonable alternatives becomes an "empty exercise." App. 46a.

The majority's decision was based on a fundamental error in defining the goal of the agency's proposed action. The scope of alternatives to be considered is a direct function of how broadly or narrowly that goal is defined. *City of New York v. U.S. Department of Transportation*, 715 F.2d 732, 743 (2d Cir. 1983). According to the majority opinion, the FAA "defined the goal for its action as helping to launch a new cargo hub *in Toledo* and thereby *helping to fuel Toledo's economy*." App. 17a (emphasis added). As a result, airports outside Toledo need not be considered because "[n]one * * * would serve the purpose of the agency's action." *Id.*

This definition of the goal violates the majority's own principle that "an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative * * * would accomplish the goals of the agency's action * * *." App. 12a. The FAA defined its goal and the applicant's preference as synonymous. If the agency's goal is the same as the applicant's preference, the only alternatives will invariably be the applicant's preference and no action. In these circumstances, the EIS is a "foreordained formality" (*id.*) or, in the dissent's words, "a vermiform appendix" (App. 38a).

This decision is in direct conflict with a decision by the Seventh Circuit. The Seventh Circuit stated in *Van Abbema v. Fornell*, 807 F.2d 633, 638 (1986):

[T]he evaluation of "alternatives" mandated by

> NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals. [emphasis in original]

The D.C. Circuit explicitly rejected this interpretation of NEPA by the Seventh Circuit. App. 19a-20a.

In *Van Abbema*, the applicant proposed to construct a facility "to transload coal from trucks to barges on the Mississippi River." 807 F.2d at 635. The court framed the suggested alternatives in terms of their comparative suitability to achieve "the general goal [which] is to deliver coal from mine to utility." *Id.* at 638. In the past, the applicant had trucked coal from its mine to a "temporary" facility in Quincy, Illinois, transferred the coal to barges, and towed the barges upriver to a power plant. *Id.* at 640. It proposed to build a new facility for "transloading" coal from trucks to barges at Warsaw, Illinois, farther upriver from Quincy. *Id.* at 640-641.

The Seventh Circuit found that the EIS failed to analyze adequately the use of the "temporary" Quincy facility as an alternative site. 807 F.2d at 640. The Army Corps of Engineers accepted "nearly verbatim" the applicant's claims that the Quincy facility had higher truck and barge costs and was therefore infeasible. Id. at 641. The Seventh Circuit found that the Corps "does not appear to have conducted any substantial investigation of alternatives on its own" (*id.* at 642) and instead attempted to "finesse any serious economic analysis by finding merely that 'the economic viability of this proposed project must be ultimately determined in the free market'" (*id.* at 639).

The facts in this case are strikingly similar to the facts in the Toledo case. In both, the federal agency did not objectively investigate the alternative of the "temporary" site already used by the applicant and did not objectively compare the relative environmental costs of the applicant's "temporary" and preferred sites. Thus, under the Seventh Circuit's standard, the FAA was required to analyze the Fort Wayne alternative.

Nevertheless, the D.C. Circuit saw "two critical flaws" in the Seventh Circuit's decision and declined to follow it. App. 19a. First, the court said that the Seventh Circuit "misconstrued the language of NEPA" in holding that the Corps had to consider any alternative ways that the applicant could accomplish "the general goal [of] deliver[ing] coal from mine to utility." *Id.* (quoting 807 F.2d at 638). The D.C. Circuit said that because NEPA only speaks of a duty to analyze alternatives to proposed "Federal actions," NEPA does not require federal agencies to consider any alternatives to proposals by non-federal applicants. App. 19a. Second, the D.C. Circuit criticized the Seventh Circuit for implying that the reviewing court is the body responsible for defining the purpose of the agency action. *Id.* at 19a-20a.

The Seventh Circuit did not hold that the reviewing court has the duty to define a project's goals. The Seventh Circuit correctly held that Congress placed this duty on federal agencies. "[T]he federal agency must determine for itself what is reasonably available." *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88, 94 (2d Cir. 1975). The D.C. Circuit improperly placed this duty entirely on the applicant.

The D.C. Circuit's analysis is directly inconsistent with

the interpretation of NEPA by the Council on Environmental Quality (CEQ). This Court has stated that "CEQ's interpretation of NEPA is entitled to substantial deference." *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

CEQ has stated that agencies must examine all alternatives "that are practical or feasible from the technical and economic standpoint and using common sense rather than simply desirable from the standpoint of the applicant." *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (March 23, 1981). Furthermore, the CEQ has stated that, in defining which alternatives are feasible, "[n]either NEPA nor the CEQ regulations make a distinction between actions initiated by a Federal agency and by applicants." *CEQ Guidance Regarding NEPA Regulations*, 48 Fed. Reg. 34263, 34266 (July 28, 1983).[6] The D.C. Circuit is the first court to create a distinction between pure and hybrid federal actions. If it is allowed to stand, it will create a new subclass of EISs for hybrid federal actions in which federal agencies need not "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14.

The D.C. Circuit's decision has enormous significance for the NEPA process. Federal agencies frequently prepare

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[6] CEQ has recognized the importance of this issue. After issuing its 1981 interpretation, it received "numerous comments" and "requests for further clarification of this question." *CEQ Guidance Regarding NEPA Regulations*, *supra*, 48 Fed. Reg. at 34266-34267. However, while CEQ stated that an agency should consider an applicant's purposes and needs when the agency defines project goals, CEQ reaffirmed its earlier interpretation that applicants can not completely define and control those goals and that all feasible and reasonable alternatives should be considered. *Id.*

EISs which evaluate proposed actions by applicants for federal permits and licenses.[7] Under the D.C. Circuit's decision, "the purpose of an agency's action" must achieve both: (1) the substantive goal (*e.g.*, a particular transportation, energy, or housing project); and (2) the applicant's preference (*e.g.*, money, jobs, convenience). This formulation allows the applicant to control the NEPA process. Once the applicant states its preferred alternative, the feasibility of other possible alternatives becomes irrelevant. An alternative like Fort Wayne can be rejected simply because the applicant (the Port Authority) believes that it will not create enough jobs and the beneficiary of the applicant's proposal (Burlington) believes that it is not accompanied by a sufficient government subsidy.

The D.C. Circuit's decision seriously undermines the NEPA requirement that federal agencies take a "'hard look' at environmental consequences" of their actions. *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21 (1976). Here, the hybrid federal action would result in the relocation of a private company from its existing, environmentally-benign location where $33 million had already been invested in airport improvements to a new, environmentally-harmful

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[7] Section 102 of NEPA directs that "to the fullest extent possible," federal agencies must prepare EISs before they approve "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Under the CEQ regulations, "major Federal actions" include actions which are proposed by private applicants if those actions have major effects and "are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. Here, the FAA prepared an EIS because the proposed nighttime air cargo hub will have major effects and because the FAA had the power to approve or deny the Port Authority's revised Airport Layout Plan and federal funding to carry out that plan. FEIS, pp. 1-3 to 1-4.

location where over $90 million must be invested for similar airport improvements and environmental mitigation costs. ROD, Att. III, p. 19 (App. 124a). In considering its action, the FAA failed to take the requisite "hard look" at an alternative which appears to be far preferable on environmental grounds.

The AAIA makes the D.C. Circuit's distinction between pure and hybrid federal actions even more untenable. That statute explicitly refers to "project grant application[s]" involving non-federal applicants and, in the same sentence, requires the FAA to determine that "no feasible and prudent alternative exists." 49 U.S.C. App. § 2208(b)(5). Thus, Congress directed the FAA to consider all feasible and prudent alternatives, not just those suggested to the FAA by private companies.

The D.C. Circuit's theory of goal-definition under NEPA has serious consequences for the ability of federal agencies to fulfull their statutory missions. In this case, the substantive goal is transportation and, more particularly, an air cargo hub. The AAIA was designed to facilitate the movement of cargo traffic throughout the entire United States, "thereby increasing safety and efficiency and reducing delays." 49 U.S.C. App. § 2201(a)(7), (11). The AAIA was not intended to spur growth in economically depressed communities. As Judge Buckley stated in his dissent, it is not "an urban welfare statute." App. 44a.

Under the majority's theory, both the nation's transportation needs and environmental policies take a back seat to Toledo's job needs. Toledo has no transportation need for an air cargo hub. Either Toledo or Fort Wayne can satisfy Burlington's transportation needs if certain airport improve-

ments are made. The majority opinion itself recognized that "the FAA never quite specified with ideal coherence the transportation goals of the project at Toledo Express." App. 30a. However, it failed to follow its own dictum that, in defining project goals, "an agency should consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act * * *." App. 12a. As a result, the majority's theory is likely to encourage federal agencies to tailor their statutory directives to local, rather than national, interests.

The FAA and the majority opinion claim that, under the Airline Deregulation Act, "Congress has * * * said that the free market * * * should determine the siting of the nation's airports." App. 15a. However, as the FAA admitted in its Record of Decision, "[w]hile the FAA is not in a position to control or direct the actions and decisions of Burlington or of [T]oledo, the FAA does have the ability to support or withhold approval for the proposed federal actions * * *." ROD, p. 9 (App. 63a). If the FAA refused approval or funding, Burlington would then be free to decide where it wants to locate its hub.

The decision below eviscerates the duty of federal agencies to consider alternatives to projects proposed by non-federal applicants. If it is allowed to stand, federal agencies can merely sit back and allow an applicant to sort out the alternatives and present its preferred alternative to the agency as a take-it-or-leave-it proposition. This is in direct conflict with the decision of the Seventh Circuit in *Van Abbema*, flatly inconsistent with CEQ's NEPA regulations, and in violation of this Court's teachings that the court's role under NEPA is "to insure that the agency has considered the environmental consequences" (*Strycker's Bay Neighborhood*

Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980)), and has made a "fully informed" decision (*Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)). This Court should therefore grant certiorari to resolve a conflict in the circuits and adopt the Seventh Circuit's view that federal agencies have a duty under NEPA to independently investigate and objectively evaluate reasonable alternatives to a federal action which involves non-federal applicants.

II. Since the AAIA Imposes a Substantive Environmental Obligation on the FAA to Ensure that Mitigation Measures "Have Been Taken" Before the FAA Approves an Airport Project, the FAA Cannot Approve Such a Project and Allow It to Operate for Years Based on a Belief that Mitigation Measures May Be Analyzed, Funded and Carried Out at Some Indefinite Point in the Future

In *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989), this Court explained that NEPA requires that "mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated." The Court also stated that NEPA does not contain "a substantive requirement that a complete mitigation plan be actually formulated and adopted." *Id.* However, in reaching this conclusion, the Court noted that "[o]ther statutes may impose substantive environmental obligations on federal agencies * * *." *Id.* at 351.

This case presents the question left open by this Court in *Methow Valley*, namely, when a federal statute does contain a substantive mitigation requirement, what steps must be taken before the federal action is approved and carried out? The decision below holds, in effect, that "substantive"

mitigation requirements are no different from "procedural" ones and therefore robs substantive requirements of their action-forcing character.

The court below recognized that Section 509(b)(5) of the AAIA imposes a substantive environmental obligation. App. 36a. That section provides that the FAA shall not authorize a project which involves a major runway extension or runway location and which has a significant adverse environmental effect unless it first finds, in part, that "all reasonable steps have been taken to minimize such adverse effect." 49 U.S.C. App. § 2208(b)(5).

By relying on a future uncompleted Part 150 study, the FAA determined that it is a reasonable step to minimize the adverse noise effects of the project. However, that study is not a step which "ha[s] been taken" before the project was approved. It is only a step which may or will be taken in the future. The FAA only states that the study will be completed "in an expeditious manner as closely as possible to the target date of the Fall of 1990," months after the FAA's July 1990 decision. ROD, p. 14 (App. 70a). At the time this petition is being filed, the study is still not completed.[8]

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[8] EPA strongly criticized the FAA for relying on a future Part 150 study. FEIS, pp. D-21, D-26. In a meeting between EPA, FAA, and the Justice Department, "[t]here was general agreement by FAA that [EPA's] position was correct and they were telling their Regional Offices not to use the 150 process in this manner." AR 969, Att. 3. EPA later withdrew its objection, but only as part of a deal in which the FAA agreed to conduct a more extensive noise study at seven airports--not including Toledo--which were scheduled to be the subject of EISs over the next year. AR 1024, p. 3. It appears that EPA and FAA excluded Toledo from this study requirement only to avoid delaying the project.

Furthermore, it is a reasonable step to require assurance that the mitigation measures recommended in the Part 150 study will be carried out before air cargo operations begin or, at the very least, by a firm, enforceable and expeditious timetable. Otherwise, as EPA stated in its comments, "people could be exposed to significant noise impacts for a number of years." FEIS, p. E-53. This is especially true where mitigation measures will cost $36 million or more (FEIS, pp. 4-32 to 4-33), relocation measures will take 3 years to complete (ROD, p. 13 (App. 68a-69a)) and sound-proofing measures may take even longer (*id.* at 13-14 (App. 69a)). However, the FAA did not require the Port Authority to show it has or can obtain funds to pay for all mitigation measures or to complete mitigation before the air cargo flights begin. There is not even a firm timetable for the completion of mitigation after flights begin. As a result, the reasonable step of requiring the Port Authority to demonstrate that it will fund and complete all recommended mitigation measures is not one which "ha[s] been taken" before the project was approved.

In sum, the FAA's decision has jeopardized the welfare of thousands of Toledo residents by approving the project without requiring the Port Authority to complete its noise study, to obtain funding for noise mitigation, to require completion of mitigation, or even to set a firm mitigation program timetable. There is a substantial risk that mitigation will never be fully funded and will never be completed. If it is not, and the FAA's decision is not reversed by this Court, the FAA will be powerless to prevent environmental harm to petitioners since it has already approved the project and allowed flight operations to begin.

The court of appeals rejected CAB's arguments on this

issue. It stated that Section 509(b)(5) "does not require agencies to take *all* steps to lessen environmental trauma, just all *reasonable* ones." App. 36a (emphasis in original). The court then held that the FAA had met its obligation under this section because the "Part 150 study *will be* detailed" and "the FAA reasonably concluded that a detailed mitigation plan, coupled with grounds to believe that the plan *will be* implemented, is enough of a reasonable step." *Id.* (emphases added).

It is well settled that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In reaching its decision, the court of appeals ignored the plain language of the statute. Section 509(b)(5) requires the FAA to find that all reasonable mitigation steps "have been taken" before it approves an airport project. Congress did not say that the FAA could approve the project so long as it believes that the mitigation plan "will be detailed" and that a plan "will be implemented" some indefinite time in the future after the project is approved and after airport operations begin.

The D.C. Circuit's opinion makes a procedure (*i.e.*, a document expressing a belief that action may take place in the future) equivalent to substance (*i.e.*, concrete steps to carry out mitigation commitments on a timely basis). In doing so, it effectively eliminates the distinction in this Court's decision in *Methow Valley* between procedural and substantive mitigation requirements in federal environmental statutes.

This decision will affect not only future airport projects by the FAA, but all projects taken under federal environmen-

tal statutes containing substantive mitigation requirements.[9] Because the decision below seriously undermines those requirements and potentially affects a large category of federal actions, this Court's review is warranted.

CONCLUSION

For these reasons, the petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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September 1991

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[9] In addition to the AAIA, this Court recognized in *Methow Valley* that the Endangered Species Act and the DOT Act also contain substantive environmental obligations. 490 U.S. at 351, n. 14. Both of these statutes apply to a wide range of federal actions, including federal licenses and permits for highways, oil leasing, housing, timber, and land management.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 1, 1990 Decided June 14, 1991

No. 90-1373

CITIZENS AGAINST BURLINGTON, INC., ET AL.,
PETITIONERS

v.

JAMES B. BUSEY IV, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,
RESPONDENT

TOLEDO-LUCAS COUNTY PORT AUTHORITY AND
BURLINGTON AIR EXPRESS, INC.,
INTERVENORS

Petition for Review of an Order
of the Federal Aviation Administration

Before BUCKLEY, WILLIAMS, and THOMAS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* THOMAS.

Opinion dissenting in part filed by *Circuit Judge* BUCKLEY.

CLARENCE THOMAS, *Circuit Judge*: The city of Toledo

decided to expand one of its airports, and the Federal Aviation Administration decided to approve the city's plan. In this petition for review of the FAA's order, an alliance of people who live near the airport contends that the FAA has violated several environmental statutes and regulations. We hold that the FAA has complied with all of the statutes and all but one of the regulations.

I.

The Toledo Express Airport, object of the controversy in this case, lies about twenty-five miles to the west of downtown Toledo. Half a mile to the southwest of the airport, surrounded by four highways and intersected by three more, lies the Oak Openings Preserve Metropark, used by joggers, skiers, and birders, and site of one of the world's twelve communities of oak savannas. Within Oak Openings lies the Springbrook Group Camp, site of a primitive (tents only) campground, and used by hikers and campers, including Richard Van Landingham III, one of the petitioners in this lawsuit. Near the airport live Daniel Kasch, Carol Vaughan, and Professor William Reuter, three of the other petitioners. The Toledo-Lucas County Port Authority, one of the intervenors, wants to make the city of Toledo a cargo hub. Burlington Air Express, Inc., the other intervenor, wants to move its operations to Toledo. Kasch, Vaughan, Reuter, Van Landingham, and others have formed Citizens Against Burlington, Inc. to stop them.

Citizens Against Burlington first materialized about a year after the Port Authority first commissioned an "Airport Noise Compatibility Planning" study (known as a "Part 150 study," *see generally* 14 C.F.R. pt. 150 & apps. A & B) and began to consider the possibility of the airport's expansion.

The Port Authority soon heard from Burlington Air Express, which had been flying its planes out of an old World War II hangar at Baer Field, an Air National Guard airport in Fort Wayne. After looking at seventeen sites in four midwestern states, Burlington chose the Toledo Express Airport. Among Burlington's reasons were the quality of Toledo's work force and the airport's prior operating record, zoning advantages, and location (near major highways and close to Detroit and Chicago). For its part, the Port Authority expects the new hub to create one thousand new jobs in metropolitan Toledo and to contribute almost $68 million per year to the local economy after three years of the hub's operation. The Port Authority plans to pay for the new hub with both private and public funds. Much of the money, however, will come from user fees and lease agreements, and more than half will come from local bonds issued to private investors. Grants from the city of Toledo and the state of Ohio will make up another, much smaller portion of the costs. The Port Authority has applied for some federal funds as well, but the FAA has reacted coolly to the Port Authority's feelers.

The Port Authority agreed to let Burlington move to Toledo when Burlington's lease at Baer Field expired, in October 1990. Burlington later extended its lease in Fort Wayne, and the Port Authority now expects Burlington to move to Toledo Express in January 1992. First, though, the Port Authority has to accommodate Burlington's operations. In the first stage of the airport's expansion, the Port Authority plans to build a concrete ramp for cargo planes, a warehouse for sorting freight, lighting for the warehouse and the area around it, a road to the warehouse, a fuel farm, a maintenance building, taxiway connections to one of the airport's runways and lighting for the new taxiways, an overrun area attached to one of the runways, new power

outlets for parked airplanes, and storage areas for de-icing equipment. In the second stage of expansion, planned for the five years after Burlington's move, the Port Authority wants to extend one of the airport's primary runways, install a landing system nearby, and build a new taxiway parallel to the extended runway.

The Port Authority submitted its proposal to the FAA on February 2, 1989 and promptly hired Coffman Associates, Inc., a consulting firm, to prepare an environmental assessment, *see* 40 C.F.R. §§ 1501.3, 1508.9, and then to convert the environmental assessment into an environmental impact statement (EIS), *see id.* § 1501.4; 42 U.S.C. § 4332(2)(C). In December 1989, the FAA sent a draft of the EIS to the Environmental Protection Agency and several state and local agencies. *See id.* § 7609; 40 C.F.R. §§ 1503.1, 1503.2. Early the next month, the FAA made the draft public and held a public hearing. *See id.* § 1502.19. Over the following six weeks, Citizens Against Burlington sent the FAA twenty-five letters, commenting on virtually every aspect of the EIS. Individuals sent over three hundred more.

On May 11, 1990, the FAA published a final environmental impact statement. The first chapter of the statement explained that the Port Authority needed the FAA's approval for its plan to expand the Toledo Express Airport and described the role in that process that Congress meant for the agency to play. The second chapter of the EIS reviewed the particulars of the Port Authority's plan, listed the fourteen separate federal statutes and regulations that applied to the Port Authority's proposal, briefly described some alternatives to acting on the Port Authority's plan, and explained why the agency had decided not to discuss those possibilities more fully. The FAA then concluded that it had to consider in

depth the environmental impacts of only two alternatives: the approval of the Port Authority's plan to expand the airport, and no action. The third chapter of the EIS described the environment affected by the proposal, and the fourth chapter detailed the environmental consequences of the two alternatives. After summarizing the environmental impacts in the fifth chapter, the agency listed in the sixth chapter the statement's preparers. Appendices to the statement collected scientific data and relevant inter-agency correspondence. In the second volume of the statement, the FAA compiled copies of the hundreds of letters concerning the draft EIS, a transcript of the public hearing, and written comments submitted after the hearing had ended.

Having approved the final EIS, the agency faced a final choice: whether to endorse the Port Authority's plan, which the agency preferred, or not to endorse the plan. In a record of decision dated July 12, 1990, the FAA approved the plan to expand the Toledo Express Airport. *See* 49 U.S.C. app. §§ 1349(a), 2208(b). Five days later, Citizens petitioned this court for review of the FAA's order and for a stay of the order pending our decision. *See id.* app. § 1486(a), (d). On August 1, we denied the latter request.

Citizens continues to press for wide-ranging declaratory and injunctive relief, asking this court to vacate the FAA's decision, to force the agency to prepare a new EIS, to enjoin the agency from approving the Port Authority's current plan, and to enjoin any further construction at Toledo Express until the FAA complies with the applicable laws. Citizens contends that the FAA has violated the National Environmental Policy Act, regulations promulgated by the Council on Environmental Quality, the Department of Transportation Act, and the Airport and Airway Improvement Act. We

consider these arguments in turn.

II.

A.

In the National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-1909, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370b), Congress resolved "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." NEPA § 101(a), 42 U.S.C. § 4331(a).[1] These sweeping policy goals have inspired some commentators to call NEPA an environmentalist Magna Carta. *See, e.g.*, D. Mandelkere, *NEPA Law and Litigation* § 1:01, at 1 (1990); *cf.* 40 C.F.R. § 1500.1(a) ("[NEPA] is our basic national charter for protection of the environment."). But instead of ordering, say, that deforested land be reforested, Congress chose to make NEPA procedural. NEPA commands agencies to imbue their decisionmaking, through the use of certain procedures, with our country's commitment to environmental salubrity. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989); *see also* 40 C.F.R. § 1502.1. NEPA does not mandate

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[1] *See also* NEPA § 2, 42 U.S.C. § 4321:

> The purposes of [NEPA] are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation . . .

particular consequences.

Just as NEPA is not a green Magna Carta, federal judges are not the barons at Runnymede. Because the statute directs agencies not only to look hard at the environmental effects of their decisions, and not to take one type of action or another, federal judges correspondingly enforce the statute by ensuring that agencies comply with NEPA's procedures, and not by trying to coax agency decisionmakers to reach certain results. *See Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983). As the Supreme Court has warned, "once an agency has made a decision to subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "'interject itself within the area of discretion of the executive as to the choice of the action to be taken."'" *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curiam) (citation omitted); *see Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) ("Neither [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions.").

In short, the obligations that NEPA levies on agencies determine the role of the courts in the statute's enforcement. This case concerns the most important responsibility that NEPA demands -- that an agency reviewing proposals for action prepare an environmental impact statement, and, more specifically, that the agency discuss in its statement alternatives to the action proposed. We consider here whether the FAA has complied with NEPA in publishing an environmental impact statement that discussed in depth two alternatives: approving the expansion of the Toledo Express Airport, and

not approving the expansion of the Toledo Express Airport.

(1)

Federal agencies must prepare environmental impact statements when they contemplate "major Federal actions significantly affecting the quality of the human environment." NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C).[2] An EIS must

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[2]The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall --

. . .

(C) include in every major recommendation or report on proposals for legislation and other major Federal actions significantly affecting the
quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

NEPA § 102, 42 U.S.C. § 4332; *see also* 40 C.F.R. § 1508.12 (defining

discuss, among other things, "alternatives to the proposed action," NEPA § 102(2)(C)(iii), 42 U.S.C. § 4332(2)(C)(iii), and the discussion of alternative forms "the heart of the environmental impact statement." 40 C.F.R. § 1502.14; *see Alaska v. Andrus*, 580 F.2d 465, 474 (D.C. Cir.), *vacated in part as moot sub. nom. Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978).

The problem for agencies is that "the term 'alternatives' is not self-defining." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978). Suppose, for example, that a utility applies for permission to build a nuclear reactor in Vernon, Vermont. Free-floating "alternatives" to the proposal for federal action might conceivably include everything from licensing a reactor in Pecos, Texas to promoting imports of hydropower from Quebec. If the Nuclear Regulatory Commission had to discuss these and other imaginable courses of action, its statement would wither into "frivolous boilerplate," *id.*, if indeed the agency were to prepare an EIS at all and not instead just deny the utility a permit. If, therefore, the consideration of alternatives is to inform both the public and the agency decisionmaker,[3] the discussion must be moored to "some notion of feasibility." *Vermont Yankee*, 435 U.S. at 551; *see id.* ("Common sense also teaches us that the

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"federal agency"); *id.* § 1508.18 ("major federal action"); *id.* § 1508.27 ("significantly"); *id.* § 1508.3 ("affecting"); *id.* § 1508.14 ("human environment").

[3]*See Methow Valley*, 490 U.S. at 349; *see also* 40 C.F.R. § 1502.14 ("This section . . . should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.").

'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every device and thought conceivable by the mind of man.").

Recognizing the harm that an unbounded understanding of alternatives might cause, *see id.* at 549-55, CEQ regulations oblige agencies to discuss only alternatives that are feasible, or (much the same thing) reasonable. 40 C.F.R. §§ 1502.14(a)-(c), 1508.25(b)(2); *see* Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,026 (1981) [hereinafter *Forty Questions*]. But the adjective "reasonable" is no more self-defining than the noun that it modifies. Consider two possible alternatives to our nuclear reactor in Vernon. Funding research in cold fusion might be an unreasonable alternative by virtue of the theory's scientific implausibility. But licensing a reactor in Lake Placid, New York might also be unreasonable, even though it passes some objective test of scientific worth. In either case, the proposed alternative is reasonable only if it will bring about the ends of federal action -- only if it will do what the licensing of the reactor in Vernon is meant to do. *See City of New York v. Department of Transp.*, 715 F.2d 732, 742-43 (2d Cir. 1983) construing NEPA § 102(2)(E), 42 U.S.C. § 4332(2)(E), (discussion of alternatives in environmental assessments)), *cert. denied*, 465 U.S. 1055 (1984); *see also City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) (per curiam) ("When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved."), *cert. denied*, 484 U.S. 870 (1987).[4] If licens-

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[4]*Cf.* 115 Cong. Rec. 40,420 (Dec. 20, 1969) (remarks of Sen. Jackson) ("alternatives" means "[t]he alternative ways of accomplishing the objectives of the proposed action and the results of not accomplishing

ing the Vernon reactor is meant to help supply energy to New England, licensing a reactor in northern New York might make equal sense. If licensing the Vernon reactor is meant as well to stimulate the Vernon job market, licensing a reactor in Lake Placid would be far less effective. The goals of an action delimit the universe of the action's reasonable alternatives.

We have held before that an agency bears the responsibility for deciding which alternatives to consider in an environmental impact statement. *See North Slope Borough v. Andrus*, 642 F.2d 589, 601 (D.C. Cir. 1980). We have also held that an agency need follow only a "rule of reason" in preparing an EIS, *see Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834, 837 (D.C. Cir. 1972), and that this rule of reason governs "both which alternatives the agency must discuss, and the extent to which it must discuss them," *Alaska v. Andrus*, 580 F.2d at 475; *see Allison v. Department of Transp.*, 908 F.2d 1024, 1031 (D.C. Cir. 1990). It follows that the agency thus bears the responsibility for defining at the outset the objectives of an action. *See City of Angoon v. Hodel*, 803 F.2d at 1021; *cf.* 40 C.F.R. § 1502.13. As the phrase "rule of reason" suggests, we review an agency's compliance with NEPA's requirements deferentially. We uphold an agency's definition of objectives so long as the objectives that the agency chooses are reasonable, and we uphold its discussion of alternatives so long as the alternatives are reasonable and the agency discusses them in reasonable detail.

We realize, as we stated before, that the word "reasonable" is not self-defining. Deference, however, does not

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the proposed action").

mean dormancy, and the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them. Environmental impact statements take time and cost money. Yet an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality. *See City of New York v. Department of Transp.*, 715 F.2d at 743. Nor may an agency frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals and the project would collapse under the weight of the possibilities.

Instead, agencies must look hard at the factors relevant to the definition of purposes. When an agency is asked to sanction a specific plan, *see* 40 C.F.R. § 1508.18(b)(4), the agency should take into account the needs and goals of the parties involved in the application. *See, e.g., Louisiana Wildlife Fed'n v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985) (per curiam); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1046-47 (1st Cir. 1982). Perhaps more importantly, an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives. *See City of New York v. Department of Transp.*, 715 F.2d at 743-45 (Congress instructed the Department of Transportation to create safety regulations for carrying nuclear fuel by interstate highway; the Department was not required to discuss the unreasonable alternative of carrying nuclear fuel around New York City by barge); *cf. Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 372 (D.C. Cir.) ("When Congress

has enacted legislation approving a specific project, the implementing agency's obligation to discuss alternatives in its [EIS] is relatively narrow."), *cert. denied*, 454 U.S. 1092 (1981).

Once an agency has considered the relevant factors, it must define goals for its action that fall somewhere within the range of reasonable choices. We review that choice, like all agency decisions to which we owe deference, on the grounds that the agency itself has advanced. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

(2)

In the first chapter of its environmental impact statement, the FAA begins by noting that the Port Authority had requested the agency's approval of the plan to develop Toledo Express. The agency then explains that "[t]he purpose and need for this action lies in [the] FAA's responsibility to review the airport design and runway configuration with respect to its safety, efficiency and utility within the national airspace system and its environmental impact on the surrounding area." After surveying the engineering reasons that justify an extended runway and new facilities, the FAA concludes by stating that the agency "has a statutory mandate to facilitate the establishment of air cargo hubs under Section 502(a)(7) [of the Airport and Airway Improvement Act of 1982 (AAIA), 49 U.S.C. app. § 2201(a)(7)] and to undertake capacity enhancement projects under Section 502(a)(11) [of the AAIA, 49 U.S.C. app. § 2201(a)(11)]."

In the second chapter of the environmental impact statement, the FAA begins by stating:

> The scope of alternatives considered by the sponsoring Federal agency, where the Federal government acts as a proprietor, is wide ranging and comprehensive. Where the Federal governments acts, not as a proprietor, but to approve and support a project being sponsored by a local government or private applicant, the Federal agency is necessarily more limited. In the latter instance, the Federal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.

The agency goes on to explain:

> In the present system of federalism, the FAA does not determine where to build and develop civilian airports, as an owner/operator. Rather, the FAA facilitates airport development by providing Federal financial assistance, and reviews and approves or disapproves revisions to Airport Layout Plans at Federally funded airports . . . . Similarly, under the Airline Deregulation Act of 1978, the FAA does not regulate rates, routes, and services of air carriers or cargo operators. Airline managements are free to decide which cities to serve based on market forces.

The EIS then describes five alternatives: approving the Port Authority's plan for expanding Toledo Express, approving other geometric configurations for expanding Toledo Express, approving other ways of channelling airplane traffic at Toledo Express, no action by the agency at all, and approving plans for other airports both in the Toledo metropolitan area and out of it, including Baer Field in Fort Wayne. Finally, the EIS briefly explains why the agency eliminated

all the alternatives but the first and the fourth. *See* 40 C.F.R. § 1502.14(a).

The FAA's reasoning fully supports its decision to evaluate only the preferred and do-nothing alternatives. The agency first examined Congress's views on how this country is to build its civilian airports. As the agency explained, Congress has told the FAA to nurture aspiring cargo hubs. *See* AAIA § 502(a)(7), (11), 49 U.S.C. app. § 2201(a)(7), (11).[5] At the same time, however, Congress has also said that the free market, not an ersatz Gosplan for aviation, should determine the siting of the nation's airports. *See* Airline Deregulation Act of 1978, Pub. L. No., 95-504, 92 Stat. 1705; *see also* 14 Weekly Comp. Pres. Doc. 1837, 1837-38 (Oct. 24, 1978) (remarks of Pres. Carter); *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 196 (7th Cir.) ("The decision to make O'Hare, or any other airport, a 'hub'

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[5]The Congress hereby finds and declares that –

...

(7) cargo hub airports play a critical role in the movement of commerce through the airport and airway system and appropriate provisions should be made to facilitate the development of and enhancement of such airports;

...

(11) airport construction and improvement projects which increase the capacity of facilities to accommodate passenger and cargo traffic, thereby increasing safety and efficiency and reducing delays, should be undertaken to the maximum feasible extent....

AAIA § 502(a), 49 U.S.C. app. § 2201(a).

airport belongs to the airlines and not to the government."), *cert. denied*, 479 U.S. 847 (1986). Congress has expressed its intent by statute, and the FAA took both of Congress's messages seriously.[6]

The FAA also took into account the Port Authority's reasons for wanting a cargo hub in Toledo. In recent years, more than fifty major companies have left the Toledo metropolitan area, and with them, over seven thousand jobs. The Port Authority expects the cargo hub at Toledo Express to create immediately more than two hundred permanent and six hundred part-time jobs with a total payroll value of more than $10 million. After three years, according to the Port Authority, the hub should create directly more than one thousand permanent jobs at the airport and one hundred and fifty other, airport-related jobs. The University of Toledo estimates that the new Toledo Express will contribute at least $42 million to the local economy after one full year of operation and nearly $68 million per year after three. In addition, the Port Authority expects the expanded airport, and Burlington's presence there, to attract other companies to Toledo. All of those factors, the Port Authority hopes, will lead to a renaissance in the Toledo metropolitan region.

Having thought hard about these appropriate factors, the

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[6]Citizens' view would require the FAA to canvass the business choices that Burlington faced when it considered leaving Fort Wayne. But the agency has neither the expertise nor the proper incentive structure to do so (it has no shareholders who would suffer from mistaken judgments). And while Congress clearly wanted NEPA to extend federal agencies' range of vision to environmental concerns, it did not, so far as we can tell, aim at agencies' acquiring skills of successful entrepreneurs. NEPA is supposed to make agencies more sensitive – but only, by definition, to matters environmental.

FAA defined the goal for its action as helping launch a new cargo hub in Toledo and thereby helping to fuel the Toledo economy. The agency then eliminated from detailed discussion the alternatives that would not accomplish this goal. Each of the different geometric configurations would mean technological problems and extravagant costs. So would plans to route traffic differently at Toledo Express, or to build a hub at one of the other airports in the city of Toledo. None of the airports outside of the Toledo area would serve the purpose of the agency's action. The FAA thus evaluated the environmental impacts of the only proposal that might reasonably accomplish that goal -- approving the construction and operation of a cargo hub at Toledo Express. It did so with the thoroughness required by law. *See* 40 C.F.R. § 1502.16.[7]

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[7]Judge Buckley maintains that the FAA, having decided to discuss the socioeconomic impacts of inaction in Toledo on Toledo was obliged then in its "No Action" section to discuss the socioeconomic impacts of inaction in Toledo on Fort Wayne. *See post* at 6-7. As Judge Buckley's dissent reveals, *see id.*, information concerning Fort Wayne's economy is already available for consumption elsewhere in the EIS. *See Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137, 1142-43 & n.5 (D.C. Cir. 1991). In any event, the FAA also discussed the (beneficial) environmental effects of inaction in Toledo on Toledo, so one can infer that it should have discussed the (presumably negative) environmental effects of inaction in Toledo on Fort Wayne. Because Toledo's loss is many other cities' potential gain, moreover, there would be no reason to limit the FAA's discussion to Fort Wayne: Indeed, one can infer that the FAA should have discussed the socioeconomic and environmental impacts of inaction in Toledo on Peoria, Akron, Detroit, and every other site assessed by Burlington's consultant. *Cf. post* at 2-7.

The EIS demonstrates that the discussion of the socioeconomic and environmental impacts of *inaction* is the flip side of the discussion of the impacts of *action*. If, for example, the FAA were to approve the Port Authority's application, Toledo would lose environmentally but gain socioeconomically, and Peoria and Fort Wayne and the other cities would

We conclude that the FAA acted reasonably in defining the purpose of its action in eliminating alternatives that would not achieve it, and in discussing (with the required do-nothing option) the proposal would. The agency has therefore complied with NEPA.

(3)

Citizens agrees that the FAA need only discuss reasonable, not all, alternatives to Toledo Express. Relying on *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986), however, Citizens argues that "the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals." *Id.* at 638 (construing NEPA § 102(2)(E), 42 U.S.C. § 4332(2)(E)). According to Citizens, the "general goal" of the Port Authority's proposal is to build a permanent cargo hub for Burlington. Since, in Citizens' view, Fort Wayne (and perhaps Peoria) will accomplish this general goal just as well as Toledo, if not better, Baer Field

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lose socioeconomically but gain environmentally. If the FAA were to reject the Port Authority's application, Toledo would remain somewhat quieter but lose some jobs, and either Peoria (or another city) might gain noise along with jobs or Fort Wayne might regain some of both. But the FAA was not obliged to discuss the environmental or socioeconomic impacts of approving airport expansions in Peoria or Fort Wayne or any of the other cities: None, as we have explained, would have fulfilled the goal of the agency's action, and all were therefore unreasonable and beyond the scope of the FAA's responsibilities. The upshot of Judge Buckley's approach, it seems to us, would be to force an agency to discuss the socioeconomic and environmental impacts of even unreasonable alternatives -- to do the very thing in the section on the do-nothing alternative that the agency need not do in the statement's main body.

is a reasonable alternative to Toledo Express, and the FAA should have discussed it in depth. Since it did not, this court should force the FAA to prepare a new (or supplemental) environmental impact statement.

We see two critical flaws in *Van Abbema*, and therefore in Citizens' argument. The first is that the *Van Abbema* court misconstrued the language of NEPA. *Van Abbema* involved a private businessman who had applied to the Army Corps of Engineers for permission to build a place to "transload" coal from trucks to barges. *See* 807 F.2d at 635. The panel decided that the Corps had to survey "feasible alternatives ... to the applicant's proposal," or alternative ways of accomplishing "the general goal [of] deliver[ing] coal from mine to utility." *Id.* at 638; *see also Trout Unlimited v. Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974). In commanding agencies to discuss "alternatives to the proposed action," however, NEPA plainly refers to alternatives to the "major *Federal* actions significantly to affecting the quality of the human environment," and not to alternatives to the applicant's proposal. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (emphasis added). An agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process. Congress did not expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action. Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be.

The second problem with *Van Abbema* lies in the court's assertion that an agency must evaluate "alternative

means to accomplish the general goal of an action," 807 F.2d at 638 (emphasis deleted) -- a statement that troubles us even if we assume that the panel was alluding to the general goals of the private proposal. Left unanswered in *Van Abbema* and Citizens' brief (and at oral argument) is why and how to distinguish general goals from specific ones and just who does the distinguishing. Someone has to define the purpose of the agency action. Implicit in *Van Abbema* is that the body responsible is the reviewing court. As we explained, however, NEPA and binding case law provide otherwise.

(4)

In chiding this court for having overreached in construing NEPA, a unanimous Supreme Court once wrote that Congress enacted NEPA "to ensure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency." *Vermont Yankee*, 435 U.S. at 558. We are forbidden from taking sides in the debate over the merits of developing the Toledo Express Airport; we are required instead only to confirm that the FAA has fulfilled its statutory obligations. Events may someday vindicate Citizens' belief that the FAA's judgment was unwise. *See id.* at 557-58. All that this court decides today is that the judgment was not uninformed. *See Methow Valley*, 490 U.S. at 351.

B.

The regulations of the Council on Environmental Quality provide that an environmental impact statement "shall [contain] a full and fair discussion of significant environmental impacts" and that "[i]mpacts shall be discussed in propor-

tion to their significance." 40 C.F.R. §§ 1502.1, 1502.2(b); *see* NEPA § 102(2)(C)(i), (ii), 42 U.S.C. § 4332(2)(C)(i), (ii). The EIS in this case discusses more than twenty impacts that the expanded Toledo Express would have on the environment, including the airport's effects on people's homes and neighborhoods; on the quality of the air, the water, and the earth, on architectural, archeological, and cultural resources; on sewage disposal; on traffic patterns; on swamps, marshes, bogs and rivers; and on bats, butterflies, grass flowers, and trees.[8] The EIS also states flatly that "[a]ircraft sound emissions" --noise, in a word-- are "often the most noticeable environmental effect[s] an airport will produce on the surrounding community." In all, the FAA devotes about half of its discussion on environmental consequences to the effects of an increase in noise. Although Citizens does not argue that the FAA failed to discuss the impacts of noise in rough proportion to the effects' importance, it does argue that the discussion is incomplete and unfair. We disagree.

The FAA begins its discussion in the EIS by describing how it assesses the effects of more noise. Using the same methods that the EPA and the Department of Housing and Urban Development use, the FAA measures in decibels the average day-night sound levels (Ldn) produced at particular sites during each twenty-four hour period, then corrects its measurement for variations in airplane speed and formation

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[8]Interestingly enough, birds and deer show no signs of being affected by the noise or exhaust fumes at the Toledo Express Airport, and officials of the Ohio Department of Natural Resources have also seen there some endangered animals, such as the spotted turtle (Clemmys guttata). State officials report that endangered plants, such as the cross-leaved milkwort (Polygala cruciata) and twisted yellow-eyed grass (Xyris torta), are even thriving right beside the main runways.

and the like, adds a ten-decibel penalty for planes that fly at night, and, under certain circumstances, modifies the result depending on the number of people affected. See 14 C.F.R. § 150.7; *id.* app. A § A150.205 (describing methodology). In response to the EPA's comments on the draft statement, the FAA applied a second method of study, analyzing the effects on noise levels of exposure at twenty-six places to a single event. The EIS thoroughly explains the social, psychological, physical, and structural impacts of noise from Toledo Express. The EIS also explains the resulting Ldn and the single-event analysis in both mathematical equations and readable English and illustrates the text and data in graphs, maps, charts, and tables.

Citizens concedes, if only implicitly, that the rule of reason guiding the FAA necessarily covers the agency's discussion of particular environmental impacts. *See Natural Resources Defense Council v. Morton*, 458 F.2d at 834. Relying on *Davison v. Department of Defense*, 560 F. Supp. 1019 (S.D. Ohio 1982), however, Citizens contends that in discussing the impacts of noise, a reasonable agency would at least estimate the number of people whom an expanded airport would keep awake. Citizens points out, moreover, that the EPA criticized the FAA's original choice of methods, and that in response to the EPA's comments the FAA agreed to modify its analysis in future cases. For these reasons, Citizens argues, we should find that the FAA's discussion was inadequate.

We think that *Davison* provides only weak support for Citizens' argument. In *Davison*, the Air Force decided to sell part on an old base to a firm that planned to use it for a cargo hub. Reviewing the adequacy of the resulting EIS, the court held that the Air Force had unreasonably failed to

quantify with some precision the people whom the hub activity would keep up at night, had unreasonably neglected to discuss whether local residents would become accustomed to the noise, and had unreasonably overlooked the physiological effects of long-term sleep disturbance. *See* 560 F. Supp. at 1036-37. Here, in contrast, the FAA did all but the first. On remand in *Davison*, moreover, the Air Force then stated in a supplement to the final EIS that "from one hundred to one thousand people may be awakened from sleep, possibly repeatedly, for up to four hours per night, approximately 250 nights per year." To the extent that the logic of *Davison* would impose a similar requirement on the FAA -- and the Air Force's estimate in Davison was not quite the paradigm of precision that Citizens demands here -- we think it inconsistent with circuit precedent.

In examining the impacts of noise on the environment, the FAA relies on wisdom and experience peculiar to the agency and alien to the judges on this court. We have thus held consistently that the rule of reason guides every aspect of the FAA's approach, including its choice of scientific method. *See, e.g., Sierra Club v. Department of Transp.*, 753 F.2d 120, 128 (D.C. Cir. 1985); *see also Valley Citizens for a Safe Environment v. Aldridge*, 886 F.2d 458, 469 (1st Cir. 1989). Employing here a method that we have previously endorsed, *see Sierra Club v. Department of Transp.*, 753 F.2d at 128, the FAA proceeded to mold a body of data, dissect it, and display it in comprehensible forms. The agency's choice of method was obviously not capricious. Nor were the factual conclusions that followed. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989) ("Because analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.'"

(citations omitted)); *Valley Citizens*, 886 F.2d at 467-69.

The EPA's criticisms of the FAA, and the agencies' subsequent deal, do not change our view of the FAA's findings. Congress wants the EPA to participate when other agencies prepare environmental impact statements. *See* 42 U.S.C. § 7609(a). The EPA participated here. But the FAA, not the EPA, bore the ultimate statutory responsible for actually preparing the environmental impact statement, and under the rule of reason, a lead agency does not have to follow the EPA's comments slavishly-- it just has to take them seriously. *See Alaska v. Andrus*, 580 F.2d at 474. The FAA considered the EPA's criticisms in this case and decided that enough had been done. That the FAA sensibly resolved to avoid any interagency disputes in the future does not make its decision in this case unreasonable. We uphold the FAA's discussion of the impacts of increased noise.

C.

The regulations of the Council on Environmental Quality require that an environmental impact statement "be prepared directly by or by a contractor selected by the lead agency." 40 C.F.R. § 1506.5(c). If the agency decides to contract out the work on the EIS, the agency must choose the contractor "to avoid a conflict of interest," and the contractor must "execute a disclosure statement prepared by the lead agency ... specifying that [it has] no financial or other interest in the outcome of the project." *Id.* Citizens argues that the FAA violated the regulations by publishing an EIS prepared for the most part by a contractor (Coffman Associates) that the agency did not itself select and that did not in any event fill out the necessary disclosure forms. The FAA maintains that it (the FAA), and not Coffman, prepared the

EIS, that even if Coffman did prepare the EIS, it (the FAA), and not the Port Authority, selected Coffman, and that even though Coffman did not fill out the disclosure statement, its (Coffman's) failure to do so was harmless error.

We reject each of the FAA's contentions. Offered the choice of preparing the environmental impacts statement in-house, the FAA chose the other permissible option and hired consultants, including Coffman. The FAA then wrote the consultants' names and qualifications, including Coffman's in a chapter of the EIS entitled "List of Preparers," *see id.* § 1502.17, a gesture that undermines the agency's current litigating position--that Coffman did not prepare the EIS, but that the FAA did instead, mostly by commenting actively on Coffman's drafts. Ultimately, however, the agency's theory founders on the plain meaning of the regulations. Although the CEQ regulations do not define the word "prepare," the dictionary does; in context, it means here "to put into written form: draw up...<directed the commission to *prepare* proposals....>." *Webster's Third New Int'l Dictionary* 1790 (unabridged ed. 1981); *see Sierra Club v. Marsh*, 714 F.Supp. 539, 550-51 (D. Me. 1989). That is just what Coffman did, as the agency freely admits. We need not decide whether the FAA's active editing of Coffman's drafts -- behavior consistent with the agency's obligation to "furnish guidance" to consultants and "participate in the preparation [of] and...independently evaluate the statement prior to its approval," 40 C.F.R. § 1506.5(c) -- made it, too, a preparer of the EIS. We are certain, however, that Coffman's initial drafts and responses to the FAA's comments made Coffman more than the agency's amanuensis.

Once the FAA decided not to prepare the environmental impact statement directly, it was obliged to pick a contractor

itself, and not to delegate the responsibility. *See id.* The EIS states that the Port Authority, not the agency, chose Coffman to work on the environmental assessment, and later, on the environmental impact statement. The EIS also states that the agency "concurred" in Coffman's selection. The FAA argues that its concurrence in the Port Authority's choice satisfied its duty under the regulations. We need not page through the dictionary at length to decide that concurring in someone else's choice of consultant is not the same as choosing a consultant of one's own.

By failing to select the consultant that prepared the environmental impact statement, the FAA violated CEQ regulations. Citizens urges us to remedy this breach by invalidating the EIS. We see no reason to do so, however, at least not solely on the ground that the FAA neglected to search on its own for a competent contractor. This particular error did not compromise the "objectivity and integrity of the NEPA process." *Forty Questions*, 46 Fed. Reg. at 18,031; *see Sierra Club v. Sigler*, 695 F.2d 957, 963 n.3 (5th Cir. 1983) (CEQ Regulations are "'designed...to minimize the conflict of interest inherent in the situation of those outside the government coming to the government for money, leases or permits while attempting impartially to analyze the environmental consequences of their getting it.'" (quoting 43 Fed. Reg. 55,987 (1978))); *cf.* 40 C.F.R. § 1500.3 ("[I]t is the [CEQ's] intention that any trivial violation of these regulations not give rise to any independent cause of action.").

The more serious infraction, in our view, was Coffman's failure to fill out the disclosure form exacted of consultants that prepare environmental impact statements. *See id.* § 1506,5(c). Citizens points out that Coffman (in

addition to having prepared the EIS) has started to prepare the Port Authority's Part 150 study, and that the scope of the study will vary directly with the status of the airport (since the Port Authority is relying on the study to fine tune its mitigation plans). The FAA argues that Coffman had no reason to know while preparing the EIS that the agency would want it to expand the Part 150 study. The FAA may well be correct, but neither the petitioners nor this court can know for certain in the absence of a completed disclosure form. Moreover, the CEQ regulations prohibit broadly any "financial or other interest in the outcome of the project." *Id.* (emphasis added); *see Forty Questions*, 46 Fed. Reg. at 18,031 (interpreting "conflict of interest" to mean "any known benefits other than general enhancement of professional reputation"). The FAA promised the petitioners in a letter that "Coffman does not have an undisclosed stake in the project that would potentially disqualify it." That ipse dixit does not reassure us. We therefore order the FAA to have Coffman execute an appropriate disclosure statement, *see* 40 C.F.R. § 1506.5(c), and, should the agency find that a conflict exists, to decide -- promptly -- on the measures to take in response.

III.

Under section 4(f) of the Department of Transportation Act of 1966, the Secretary of Transportation may not approve a project requiring the use of a park unless he determines, first, that there is no "prudent and feasible alternative" to using the land, and second, that the project includes "all possible planning to minimize harm to the park ... resulting from the use." Transportation Act § 4(f), 49

U.S.C. § 303(c).[9] The FAA (which is part of the Department Transportation, see 49 U.S.C. § 106(a)) acknowledged that the proposed expansion of Toledo Express would constructively "use" the Springbrook campground since flights from the airport would subject the camp to nighttime noise of up to Ldn 75 decibels, about 10 to 15 decibels more than now. *Cf. Allison v. Department of Transp.*, 908 F.2d 1024, 1030 (D.C. Cir. 1990) (no section 4(f) use when park is subjected to only minor increases in airplane noise). The agency nonetheless decided that while there might be a feasible alternative to using the campground, *cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971) (alternative is "feasible" unless "as a matter of sound engineering" it should not be built), there existed no prudent one, and that the project would ease the harm to Springbrook by moving it elsewhere inside the park, but outside the reach of Ldn 65 decibels. Citizens argues that a feasible and prudent alternative to using the campground did exist: leaving the airport in Toledo alone and expanding the airport in Fort Wayne instead. Citizens also argues that the project does not adequately diminish the harm to Springbrook

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[9]The Secretary [of Transportation] may approve a transportation program or project ... requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance ... only if--

> (1) there is no prudent and feasible alternative to using that land; and
>
> (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

Transportation Act § 4(f), 49 U.S.C. § 303(c).

because the FAA did not consider, among other ideas, fining the owners of planes that are noisy, and because the FAA has not said where exactly in Oak Openings it plans to put the new campground.

Overton Park instructs courts to undertake "a thorough, probing, in-depth review" of decisions under section 4(f), 401 U.S. at 415, and to canvass the facts of section 4(f) cases "searching[ly] and careful[ly]," *id.* at 416. Our ultimate standard of review is nonetheless deferential. *See id.*; *Eagle Found., Ind. v. Dole*, 813 F.2d 798, 804 (7th Cir. 1987). We are entrusted with ensuring that the agency looked hard at the pertinent facts and thought hard about the relevant factors. *See id.* at 803. We are required to repudiate agency caprice. Once we determine that the agency's decision was reasonable, however, we are not entitled to displace its decision with our own or with anyone else's. *See Overton Park*, 401 U.S. at 416.

Reasoning by analogy to NEPA, the FAA argues that an alternative must be imprudent under section 4(f)(1) if it fails to accomplish a proposal's objectives. According to the FAA, since a hub in Fort Wayne would do nothing for Toledo, and since the health of the Toledo economy was a primary reason for the Port Authority's application, Fort Wayne was an imprudent alternative and the FAA did not act arbitrarily in approving the use of Springbrook. In effect, the FAA's argument would mean that anytime an alternative is unreasonable under NEPA (and thus would not have to be discussed in detail in the environmental impact statement), the alternative would also be imprudent within the meaning of section 4(f)(1) of the Transportation Act (and thus would not block approval of transportation project).

Although an agency's analysis under NEPA and the Transportation Act might proceed in similar tracks, the two statutes are not precisely the same. The Transportation Act differs from NEPA in at least two ways. First, the Transportation Act requires the agency to evaluate "prudent ... alternatives to *using th[e] land*" -- alternatives to the project, that is -- not alternatives to the federal action. Second, contrary to the FAA's argument, the case law uniformly holds that an alternative is imprudent under section 4(f)(1) if it does not meet the transportation needs a project. *See Hickory Neighborhood Defense League v. Skinner*, 910 F.2d 159 164 (4th Cir. 1990); *Druid Hills Civic Ass'n v. Federal Highway Admin.*, 772 F.2d 700, 715 (11th Cir. 1985); *Arizona Past & Future Found. v. Dole*, 722 F.2d 1423, 1428-29 (9th Cir. 1983). The Transportation Act is similar to NEPA in that the agency bears the responsibility for defining at the outset the transportation goals for a project and for determining which alternatives would reasonably fulfill those goals.

Having focused on the statutes' apparent similarities, and disregarded their differences, the FAA never quite specified with ideal coherence the transportation goals of the project at Toledo Express. In future cases, the agency should bear in mind the differences between NEPA and the Transportation Act, and the agency's section 4(f) documentation package should reflect the concerns specific to the latter statute. Still, in approving in this case the use of the park in Toledo, the FAA reasonably defined the transportation goals of the project as providing the Toledo area with a modern, effective cargo hub. Given this definition of the project's aims, the FAA need not have examined in detail the relative flaws of Baer Field, including its antiquated condition, its distance from Burlington's main markets (Detroit and

Chicago), Fort Wayne's limited pool of labor, and the city's failure to come up with the necessary financing. It was enough for the agency to find that a hub in Baer Field would not fulfill the transportation goals of the project at Toledo Express and that Fort Wayne was therefore less than a prudent alternative to using Toledo. Because its conclusion was reasonable, the FAA did not violate section 4(f)(1).

Nor did the FAA violate section 4(f)(2), which requires that the "project include[] all possible planning to minimize harm to the park." Light from the expanded Toledo Express airport might temporarily blind amateur astrophotographers, and planes, in addition to stars, might appear in their pictures. More noise would make camping at Springbrook less enjoyable. The FAA thus plans to install shielded, low-pressure sodium lights in the airport's parking lots and to move the campground somewhere else in the park, out of the range of the Ldn 65 decibels. Citizens accepts the measures meant to save astrophotography, but it (and the EPA) would rather the FAA try other tactics to save the present campground, such as fining the owners of noisy planes or requiring the use of noise barriers. If Springbrook is to be moved, moreover, Citizens wants to know exactly where.

The deference we pay to decisions under section 4(f)(1), however, *see Eagle Found.*, 813 F.2d at 803-08, applies as well to decisions under section 4(f)(2), *see Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 65-66 (D.C. Cir. 1987). Congress wanted the agencies, not the courts, to evaluate plans to reduce environmental damage. The FAA thoroughly examined the impacts that the airport's expansion would have on protected parkland and proposed various tactics to mitigate them. The FAA then decided (with the support of the Department of the Interior) to move the

campground to the half of Oak Openings that falls outside the range of Ldn 65 decibels. Citizens, dissatisfied, wants us to force the FAA to pinpoint the new campground's geographic coordinates. But federal courts are neither empowered nor competent to micromanage strategies for saving the nation's parklands. *See id.* at 66. Because the FAA's decision in this case does not reflect "a clear error of judgment," we are constrained to let it stand. *Overton Park*, 401 U.S. at 416.

IV.

Under section 509(b)(5) of the Airport and Airway Improvement Act of 1982 (AAIA), the FAA may not approve a project that harms the environment unless the agency first determines that there is no "feasible and prudent alternative" and that "all reasonable steps have been taken to minimize [the] adverse effect." AAIA § 509(b)(5), 49 U.S.C. app. § 2208(b)(5).[10] Citizens argues that any time the FAA violates section 4(f)(1) of the Transportation Act, the agency automatically violates section 509(b)(5) of the AAIA as well. We recognize that some of section 509(b)(5)

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[10]**[T]he Secretary [of Transportation] shall consult with the Secretary of the Interior and the Administrator of the [EPA] with regard to any project included in a project grant application involving airport location, a major runway extension, or runway location which may have a significant impact on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have significant adverse effect unless the Secretary shall render a finding...that no feasible and prudent alternative exists and that all reasonable steps have been taken to minimize such adverse effect.**

AAIA § 509(b)(5), 49 U.S.C. app. § 2208(b)(5).

parrots some of section 4(f)(1). An agency that fails to choose a "prudent and feasible alternative," AAIA § 509(b)(5), 49 U.S.C. app. § 2208(b)(5), obviously fails at the same time to choose a "feasible and prudent alternative," Transportation Act § 4(f)(1), 49 U.S.C. § 303(c)(1). The agency can violate or observe two statutes synchronously. But we have already determined that the FAA did *not* violate section 4(f)(1): Fort Wayne was an impudent, if feasible, alternative to Toledo. Therefore, although we agree in principle with this aspect of Citizens' theory, we have little trouble deciding under section 509(b)(5) that while Fort Wayne may have been a feasible alternative to Toledo, it was also an imprudent one.

We have also upheld in this case the informal finding required by section 4(f)(2) of the Transportation Act, that the Toledo Express project includes "all *possible* planning to minimize harm" to Oak Openings. Transportation Act § 4(f)(2), 49 U.S.C. § 303(c)(2) (emphasis added). Section 509(b)(5) of the AAIA, though roughly congruous, commands agencies to find that "all *reasonable* steps have been taken to minimize such adverse effect." AAIA § 509(b)(5), 49 U.S.C. app. § 2208(b)(5) (emphasis added). We do not decide whether and under what circumstances a mitigation plan that is unreasonable would still be possible -- that is, whether the FAA might have to implement plans under section 509(b)(5).[11] We do decide, however, that all plans

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[11] *Cf.* AAIA § 509(c), 49 U.S.C. app. § 2208(c):

> Nothing in this subsection shall affect or discharge any responsibility or obligation of the Secretary under any other federal law, including ... the National Environmental Policy Act of 1969 [or] section 303 of this title [section 4 of the Transportation Act] ....

that are impossible are necessarily unreasonable -- that is, that when the FAA does not have to implement a particular plan under section 4(f)(2) of the Transportation Act, it is also spared from having to implement that plan under section 509(b)(5) of the AAIA. The FAA has done all that it could have for Oak Openings. It has therefore done all that it should have. With respect to Oak Openings, the FAA has not violated section 509(b)(5).

Section 509(b)(5), however, does cover more than just parks and historic landmarks. The statute applies to virtually everything environmental. *Compare* AAIA § 509(b)(5), 49 U.S.C. app. § 2208(b)(5) ("natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment") *with* Transportation Act § 4(f), 49 U.S.C. § 303(c) ("publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance"). Citizens thus argues further that whatever the FAA has planned for Oak Openings, the agency has violated Section 509(b)(5) with respect to other areas of the environment affected by the proposed expansion. Again, we disagree.

The EIS in this case states that the Port Authority has promised to take several steps to blunt the impact of the increased noise: those measures include buying out the owners of every private house and nursing home within range of more than L_{dn} 75 decibels, insulating doors and windows in homes subjected to noise between L_{dn} 70 and 75 decibels, and buying easements from the owners of homes within the reach of L_{dn} 65 to 70 decibels. The EIS estimates how much the mitigation plans will cost. The EIS explains

that the Part 150 study (which requires that the FAA consider certain minimum noise-control alternatives) will help flesh out the details of the mitigation plans.[12] The EIS also notes that the FAA will impose conditions on its grants designed to ensure that the Port Authority delivers. Citizens, dissatisfied, wants the specifics now: It demands that the FAA finish its Part 150 study before the agency be allowed to approve the Toledo proposal. Citizens demands further that the FAA actually execute its mitigation strategy before Burlington starts flying out of Toledo. In Citizens' view, the latter is required by section 509(b)(5) and the former is required both by section 509(b)(5) and by the Supreme Court's interpretation of NEPA in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

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[12]Under the FAA's regulations, the operator of an airport must report on:

> (1) Acquisition of land and interests therein, including ... air rights, easements, and development rights, to ensure the use of property for purposes which are compatible with airport operations.
>
> (2) The construction of barriers in acoustical shielding, including the soundproofing of public buildings.
>
> (3) The implementation of a preferential runway system.
>
> (4) The use of flight procedures (including the modification of flight tracks) to control the operation of aircraft to reduce exposure of individuals (or specific noise sensitive areas) to noise in the area around the airport.
>
> (5) The implementation of any restriction on the use of [the] airport by any type or class of aircraft based on the noise characteristics of those aircraft ....

14 C.F.R. app. B § B150.7(b).

We think that Citizens reads too much into both *Methow Valley* and section 509(b)(5). Neither one prescribes specific form or content for environmental impact statements. Instead, as the Supreme Court noted in passing, both the CEQ regulations and NEPA itself compel only "a reasonably complete discussion of possible mitigation measures." 490 U.S. at 352; *see id.* at 351-52 (interpreting NEPA § 102(2)(C)(ii), 42 U.S.C. § 4332(2)(C)(ii), and 40 C.F.R. §§ 1508.25(b), 1502.14(f), 1502.16(h), 1502.2(c)); *Forty Questions*, 46 Fed. Reg. at 18,031-32. The EIS in this case may not be flawless, but it certainly is reasonably complete.

The same is true of the Port Authority's mitigation plans. NEPA not only does not require agencies to discuss any particular mitigation plans that they might put in place, it does not require agencies -- or third parties -- to effect any. *See Methow Valley*, 490 U.S. at 353 & n.16. Section 509(b)(5), in contrast, does "impose substantive environmental obligations on federal agencies." *Id.* at 351. But section 509(b)(5) does not order agencies to take *all* steps to lessen environmental trauma, just all *reasonable* ones. Congress has entrusted the FAA with the statute's administration, and in interpreting section 509(b)(5)'s ambiguous language the FAA reasonably concluded that a detailed mitigation plan, coupled with grounds to believe that the plan will be implemented, is enough of a "reasonable step." We do not mean to suggest that the agency's program is perfect; indeed, the FAA acknowledges that the Part 150 study by itself would not nearly be enough to satisfy the statute. But the Port Authority's Part 150 study will be detailed, as the law requires, and we do not think that the agency committed a "clear error of judgment" in deciding to use the study to perfect the timing of an otherwise concrete proposal. *Overton Park*, 401 U.S. at 416. The FAA has therefore met

its obligations under the statute.

V.

We hold that the FAA has fulfilled the requirements of NEPA, the Transportation Act, the AAIA, and all the CEQ regulations but one. We therefore grant the petition for review and remand to the agency so that it may comply with 40 C.F.R. § 1506.5(c). We affirm the FAA's decision in all other respects. Given the limited nature of what remains for the agency to do, we decline to enjoin the continuing development of Toledo Express or to grant any other of the equitable relief that the petitioners have asked for. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 541-46 (1987); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.").

It is so ordered.

BUCKLEY, *Circuit Judge, dissenting in part*: Burlington Air Express and the Federal Aviation Administration might be right: On substantial economic and environmental balance, Toledo Express Airport may well be the only suitable site of Burlington's air cargo hub. The public cannot know for certain, however, and neither can the FAA. By refusing to inquire into the feasibility of sites rejected by Burlington, the agency sidestepped its obligation to prepare "a detailed statement ... on ... alternatives to the proposed action." 42 U.S.C. § 4332(2)(C) (1988). The majority endorses this evasion. I cannot, and therefore I dissent from part II(A) of the majority opinion. While "the concept of 'alternatives' is an evolving one," *Vermont Yankee Nuclear Power Corp. v.*

NRDC, 435 U.S. 519, 552 (1978), judicial evolution may not reduce it to a vermiform appendix.

I.

In a narrow sense, the only federal action that is involved when a non-federal applicant seeks federal approval or funding is the agency's decision to grant or deny the applicant's request. No one disputes, however, that the agency's environmental impact statement ("EIS") must inquire into reasonable alternatives to the applicant's proposal. The only controversy is over the nature of the alternatives that the EIS should consider. *See, e.g., Friends of the River v. FERC*, 720 F.2d 93, 104-05 (D.C. Cir. 1983) (permit to operate hydroelectric plant; alternative of purchasing power from other producers); *Mason County Med. Ass'n v. Knebel*, 563 F.2d 256, 262-63 (6th Cir. 1977) (permit to build coal-fired steam electric generator; alternatives of nuclear, geothermal, conservation, purchased power, and others); *North Carolina v. FPC*, 533 F.2d 702, 707 (D.C. Cir.) (permit to build hydroelectric plant; alternative of conservation), *vacated on other grounds*, 429 U.S. 891 (1976).

The majority would limit the consideration of alternatives to those available to the Toledo-Lucas County Port Authority. As the majority sees it, the FAA "defined the goal for its action as helping to launch a new cargo hub in Toledo and thereby helping to fuel the Toledo economy." As a consequence, airports outside the Toledo area were not to be considered because "[n]one ... would serve the purpose of the agency's action." Maj. op. at 15. I read the EIS differently. Recognizing that Burlington is an essential party to the Port Authority's application, the FAA understands that

the EIS must consider any reasonable alternative to Toledo Express Airport that might be available to Burlington, whether it lies within the Toledo area or outside it.

Thus, while the EIS begins by reviewing the proposed construction and expansion of the Toledo Express Airport. EIS at 1-1, it pays particular attention to Burlington. The "Background" section recounts Burlington's existing operations at Fort Wayne, Burlington's unsuccessful negotiation for the expanded facilities required for a permanent hub at Fort Wayne, Burlington's decision to look elsewhere, Burlington's analysis of seventeen sites, and Burlington's ultimate section of Toledo. *Id.* at 1-2. The "Alternatives" section rejects the other four airports in the Toledo area in part because their expansion would take longer, and "Burlington officials have indicated they cannot accommodate an extended time period." *Id.* at 2-15. "Burlington officials have indicated that Fort Wayne is not a permanent alternative," and that other airports surveyed by Burlington's consultants were rejected "because of the advantages of the Toledo Express Airport." *Id.* at 2-15, 2-16. The "Benefits of Proposed Project" section acknowledges the economic advantages that will flow to Toledo, but links them to Burlington's decision to locate there. "The Proposed Project, while serving a demand that is being created by Burlington Air Express's decision to locate in Toledo, will provide economic benefits and employment opportunities to the community." *Id.* at 1-4. Burlington makes the demands that define the project; Toledo enjoys the benefits that result.

The FAA takes a broader view of its responsibilities because it acknowledges that the proposed project is intended to serve several purposes. Toledo seeks the substantial economic benefits that will accrue from the establishment of

an air cargo hub in its metropolitan area. Burlington seeks a home for its air cargo operations, one that will be tailored to its specifications. For its part, the FAA is conscious of its mandate, under the Airport and Airway Improvement Act ("AAIA"), 49 U.S.C. app. § 2201(a)(7) (1988), to encourage the development of a national system of air cargo hubs. *See* EIS at S-1 to S-2.

I cannot fault the FAA for the attention given Burlington and its preferences. While both Toledo and Burlington are indispensable to the enterprise, Burlington is plainly the dominant partner; its requirements and desires shaped the project from the start. As the agency points out in its Record of Decision ("ROD"), "[t]he demand for this project is clearly based on a business decision by Burlington Air Express and the interest of a local airport sponsor, the Toledo-Lucas County Port Authority, in accommodating and facilitating this decision." ROD at 29.

I do fault the agency for failing to attend to its own business, which is to examine all alternatives "that are practical or feasible from the technical and economic standpoint ... rather than simply desirable from the standpoint of the applicant." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations ("Forty Questions"), 46 Fed. Reg. 18,026, 18,027 (1981) (emphasis omitted). As far as I can tell, the FAA never questioned Burlington's assertions that of the ones considered, Toledo Express is the only airport suitable to its purposes. Instead, the agency simply accepted Burlington's "Toledo-or-bust" position. Thus, the EIS notes that Burlington hired consultants to help it choose a new hub site, and that the consultants prepared a confidential report. EIS at 2-1 to 2-2. The impact statement fails to summarize the

report; indeed, it does not say whether Burlington made the document available to the FAA. The EIS reports that a letter from the consultants demonstrates that Burlington's Toledo decision rests on "legitimate business interests." *Id.* at 2-2. Of Burlington's decision to leave Fort Wayne, the FAA's Record of Decision similarly declares: "This is a business decision on the part of Burlington, in which the FAA has not been involved." ROD at 10. The FAA thus accepts at face value Burlington's assertion that it had no second choice. *See* EIS at 2-16; ROD at 30-31.

Burlington's stance may have been at least partly tactical. The consultants told the FAA that their "overall business judgement ... was to recommend Toledo"; they made no claim that Toledo was the only feasible site among the seventeen examined. EIS app. at E-64. In its comments on the EIS, Burlington conceded that it "would obviously have preferred to remain at Fort Wayne." *Id.* app. at E-28. A principal obstacle was money: "Fort Wayne was unable to compose a competitive funding package and development plan for a permanent hub," *id.*, whereas Toledo "worked diligently" to produce a "creative" funding package, *id.* app. at E-27.

Nevertheless, Fort Wayne kept trying; in an April 1990 letter, the Fort Wayne-Allen County Airport Authority assured Burlington that "it is totally feasible to expect to structure a financial package for Fort Wayne similar to that currently under consideration at Toledo." Joint Appendix 266. Replying in early May 1990 -- the same month the final EIS was issued -- Burlington expressed appreciation for the "cooperative and constructive tone of your letter" and the "really outstanding character of the Airport Authority," and said that it would "look to Fort Wayne for support and

solutions as and if our Toledo commitment is altered by any of the risks or uncertainties that lie ahead." *Id.* at 268.

Although this exchange was not part of the record at the time the EIS was prepared, parties commenting on the EIS inquired about newspaper reports of reopened negotiations between Burlington and Fort Wayne, and the FAA asked the company to clarify its position. In a letter dated June 27, 1990, its Chief Executive Officer stated "for the record that Burlington does not have any existing viable alternative to the proposed new hub project at Toledo." ROD at 30-31. Once again, the FAA took Burlington at its word: "Base [sic] on this reconfirmation of the findings in the FEIS [Final EIS], the FEIS need not be revised or supplemented to consider Fort Wayne as a reasonable alternative." *Id.* at 31.

I do not suggest that Burlington is untrustworthy, only that the FAA had the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project. It may well be that none of the sixteen other alternatives examined by Burlington and its consultants could be converted into a viable air cargo hub at acceptable cost. That, however, was something that the FAA should have determined for itself instead of accepting as a given. Under NEPA, "the federal agency must itself determine what is reasonably available." *Trinity Episcopal School Corp. v. Romney,* 523 F.2d 88, 94 (2d Cir. 1975); *see Van Abbema v. Fornell,* 807 F.2d 633, 642 (7th Cir. 1986) (condemning agency's "blind reliance on material prepared by the applicant"). By allowing the FAA to abandon this requirement, the majority establishes a precedent that will permit an applicant and a third-party beneficiary of federal action to define the limits of the EIS inquiry and thus to frustrate one of the principal safeguards of the

NEPA process, the mandatory consideration of reasonable alternatives.

The majority and the FAA respond to any suggestions that Fort Wayne might be a feasible alternative by emphasizing that the federal government can no longer tell carriers where to place hub airports. Maj. op. at 13-14; EIS app. at C-16. They miss the point. While the agency cannot tell Burlington where to go, it can refuse to approve the Toledo project, or to provide any funding for it. The agency's Record of Decision acknowledges as much: "While the FAA is not in a position to control or direct the actions and decisions of Burlington or of ["Toledo"], the FAA does have the ability to support or withhold approval for the proposed federal actions ... ." ROD at 9. It is the exercise of that discretion that the EIS is supposed to inform.

Had the FAA rejected the proposal on the ground that Fort Wayne is a feasible, environmentally preferable alternative, it would not have been ordering Burlington "to establish hubbing operations at a specific airport." EIS app. at C-16. Burlington would still have been free to seek out another location, as it insisted it would should the Toledo application be denied. Rather, the agency would simply have exercised its statutory responsibility to base its decision on a "comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action." *NRDC v. Morton,* 458 F.2d 827, 833 (D.C. Cir. 1972).

II.

Even if the FAA had correctly concluded that the only reasonable alternative was "No Action," its EIS would still

be flawed. By viewing the no-action alternative exclusively through Toledo's eyes, it failed to appreciate that that city's gains must necessarily be Fort Wayne's losses. Thus the EIS informs us that whereas the proposed project would produce 750 new jobs and $17 million for the Toledo economy during the first full year of operation, EIS at 1-4, "the no-action alternative would mean foregoing ... [these] economic benefits." *Id.* at 2-13.

This analysis suggests that the jobs and dollars will arise spontaneously from the Toledo soil. In reality, Toledo's gains will come at Fort Wayne's expense. Burlington's Forty Wayne payroll is $8 million, *id.* app. at B-92; its Toledo payroll will begin at $9 million, *id.* at 1-4. If the project were canceled, Toledo would forego "substantial economic benefits," *id.* at 2-13; but, unless Burlington were to shut down entirely, which it has asserted it will not, Toledo's loss would be offset by jobs and economic activity in Fort Wayne, or whatever other city ultimately served as Burlington's permanent hub.

More broadly, by emphasizing the economic consequences to Toledo, the FAA and the majority seem to view the Airports and Airways Improvement Act as an urban welfare statute. As the EIS notes, the AAIA merely directs the FAA "to facilitate the establishment of air cargo hubs" in the United States. *Id.* at 1-3. While a city will inevitably benefit economically from proximity to a major airport, this is no more than a by-product of federal funding under the AIAA. From a national perspective, it is of little consequence whether the beneficiary of this federal activity is Toledo or some other community.

The FAA was probably free to disregard economic

effects in the EIS. *See* CEQ Regulations, 40 C.F.R. § 1508.14 (1990) (requiring discussion of economic effects only if they are "interrelated with natural environmental effects). Once it undertook to discuss them, however, it was obliged to be impartial; an EIS "must be objectively prepared and not slanted to support the choice of the agency's preferred alternative." Forty Questions, 46 Fed. Reg. at 18,027. Because the FAA's no-action analysis failed to recognize the impact on the Fort Wayne economy, it failed to meet the standard of objectivity required by NEPA.

III.

The EIS requirement "seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project ... which would alter the environmental impact and the cost-benefit balance." *Calvert Cliffs' Coordinating Comm. Inc. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). With its uncritical dismissal of alternatives and its myopic view of economic consequences, the EIS here fell short of this objective. As a result, we cannot be confident that in approving Toledo's applications, the FAA took the pertinent environmental as well as economic and technical considerations into the balance. And that, of course, is the purpose of the National Environmental Policy Act.

By sanctioning the FAA's approach, the majority in effect allows a non-federal party to sort out alternatives based entirely on economic considerations, and then to present its preferred alternative as a take-it-or-leave-it proposition. If allowed to stand, today's decision will undermine the NEPA aim of "inject[ing] environmental considerations into the federal agency's decisionmaking process." *Weinberger v.*

Catholic Action of Hawaii/Peace Educ. Proj., 454 U.S. 139, 143 (1981). The discussion of reasonable alternatives -- "the heart of the environmental impact statement," 40 C.F.R. § 1502.14 -- becomes an empty exercise when the only alternatives addressed are the proposed project and inaction.

In our first encounter with NEPA twenty years ago, we spoke of the duty to ensure that "important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." *Calvert Cliffs'*, 449 F.2d at 1111. Because I believe that the court today shirks that duty, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-1373 September Term, 1990

Citizens Against Burlington, Inc., et al.,
Petitioners

v.

James B. Busey IV, Administrator,
Federal Aviation Administration,
Respondent

Petition for Review of an Order of the Federal Aviation Administration

Filed: June 14, 1991

Before Buckley, Williams, and Thomas, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Federal Aviation Administration and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the petition for review is granted in part and denied in part, and that the case is remanded for further proceedings, all in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/

CONSTANCE L. DUPRE, CLERK

Date: June 14, 1991
Opinion for the Court filed by Circuit Judge Thomas
Opinion dissenting in part filed by Circuit Judge Buckley

APPENDIX C

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
GREAT LAKES REGION

RECORD OF DECISION
FOR
TOLEDO EXPRESS AIRPORT
TOLEDO, OHIO

JULY 12, 1990

I. Introduction and Background

Toledo Express Airport encompasses approximately 1,500 acres of land and is located 25 miles west of downtown Toledo, within Swanton and Monclova Townships, Lucas County, Ohio. The airport is owned by the City of Toledo and operated by the Toledo-Lucas County Port Authority (T-LCPA). The airport serves the Toledo Metropolitan area which includes portions of southeastern Michigan and northwestern Ohio. The Toledo Express Airport is classified as an air carrier/general aviation airport, and is used for both military and civilian operations. The 180th Tactical Fighter Wing of the Ohio Air National Guard is based on the field.

In April 1988, T-LPCA initiated a Master Plan Update Study for Toledo Express Airport that was financed in part with Federal funds issued under the Airport and Airway Improvement Act of 1982. Simultaneous with the conduct of the Master Plan Study, T-LCPA undertook a Federal Aviation Regulations (FAR) Part 150 Noise Compatibility Planning

Study. As part of the Master Study, an Airport Layout Plan was developed which shows the existing and proposed facilities that T-LCPA considers necessary for the operation and continued development of the airport.

Subsequent to the initiation of the master plan update, T-LCPA was approached by an air cargo operator, Burlington Air Express, which was seeking to establish a permanent air cargo hub after operating at Fort Wayne, Indiana since 1985. Burlington Air Express had at that time entered into a five-year agreement with the Ft. Wayne-Allen County Airport Authority to establish a temporary air cargo hub at Baer Field, Ft. Wayne, Indiana. In order to establish a permanent hub at Baer Field, a new sorting building, a ramp, and additional airport improvements needed to be built for Burlington to use. Unable to reach an agreement for the improvements needed to stay in Ft. Wayne, Burlington began looking for alternative sites in 1987. After examining seventeen (17) airports in four Midwestern states, Burlington determined that the best location for a new permanent hub would be in Toledo, Ohio at the Toledo Express Airport. This site selection process is described in the FEIS on pages 2-1 through 2-2.

Burlington negotiated an agreement with the T-LCPA to commence operations at Toledo Express Airport in October, 1990 as Burlington was originally scheduled to depart Ft. Wayne by that date. Burlington recently negotiated a lease extension at Ft. Wayne to January 1, 1992 to allow sufficient time for construction of new facilities.

As a result of the agreement between T-LCPA and Burlington, many of the improvements shown on the updated Airport Layout Plan are to support the development of a

national air cargo hub. However, the T-LCPA is continuing the preparation of its Master Plan for the airport to evaluate existing conditions and facilities and to provide direction for future development. The FAR Part 150 Noise Compatibility Study, also under preparation, is to specifically evaluate noise and land use compatibility issues associated with existing and future airport operations.

On February 2, 1989,[1] T-LCPA submitted to the Federal Aviation Administration (FAA) its first Airport Layout Plan revisions for approval. Aeronautical studies of this Airport Layout Plan revisions and others to follow were conducted by the FAA from June 1989 to June 1990, to determine their acceptability from an airspace utilization standpoint. Approval of the Airport Layout Plan signifies FAA's concurrence with design of proposed improvements from the standpoint of safety, utility, and efficiency.

The FAA completed a Final Environmental Impact Statement (FEIS) evaluating the Airport Layout Plan revisions submitted in 1989 and 1990, and other Federal actions described in this Record of Decision. The FAA approved the FEIS on May 11, 1990.

II. Federal Actions Required to Implement the Preferred Alternative

The first federal action to be undertaken consists of the approval of a revision to the Airport Layout Plan for the airport to facilitate T-LCPA's construction of facilities at the airport for an air cargo hub. The purpose and need for this action lies in FAA's responsibility to review the airport

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[1]Subsequent revisions have been submitted to the FAA for review.

design and runway configuration with respect to its safety, efficiency and utility within the national airspace system and its environmental impact on the surrounding area.

Chapter One of the Final Environmental Impact Statement (FEIS) describes the airport development items which will require Federal approval on the Airport Layout Plan. These are also identified in the following section of this Record of Decision.

An Airport Layout Plan showing the proposed improvements has been processed by the FAA to determine conformance with FAA design criteria and implications for federal grant agreements (refer to Federal Aviation Regulations Parts 77, 152, and 157). The FAA has performed airspace reviews of the proposed development and has ensured that the improvements and procedures proposed for development at Toledo Express Airport, which are described in the FEIS, are generally compatible with existing airspace alignment and procedures (see Attachment I to this Record of Decision (ROD)). In conjunction with federal processing of the Airport Layout Plan, an application for federal financial assistance will be made by the T-LCPA for various items in the project which are depicted on the plan.

The Preferred Alternative will require FAA action in the establishment of air traffic control and flight operating procedures for use in conjunction with the proposed development. The FAA will develop additional air traffic control and airspace management procedures designed to effect the safe and efficient movement of air traffic to and from the airport as described in the FEIS and depicted on the Airport Layout Plan. With respect to the close-in terminal air traffic and airspace environment used for the final phase of landing and

initial phases of take-off, the FAA will design and establish appropriate standardized flight operating procedures, within the contours set forth within the FEIS, for use with the runway extension and Category II ILS.

FAA action also could include the installation/relocation and operations of various ground based air navigation facilities located on or off the airport depicted on the Airport Layout Plan and described in the FEIS and Attachment I to this ROD. These navigational aids are associated with the extended runway and Category II ILS.

In conjunction with future CAT II ILS, if the air cargo operations will require CAT II ILS capability, the air cargo aircraft operators must obtain authorization by means of changes in their operations specifications through the applicable FAA Principal Operations Inspector.

Finally, implementation of the Proposed Project will require action by another Federal agency, the U. S. Army Corps of Engineers, in regard to the issuance of a dredge and fill permit for the runway extension under Section 404 of the Federal Clean Water Act.

III. Airport Development Proposed on the Airport Layout Plan

The Preferred Alternative involves the construction of facilities related to establishing an air cargo hub at Toledo Express Airport and the introduction of air cargo operations. The overall development is shown on the Airport Layout Plan and is assessed in the FEIS. Two distinct phases are assessed in the FEIS:

Phase 1 (To be Completed Before Operations Begin)

- o 40-acre Concrete Ramp for Air Cargo Aircraft
- o 279,000 Square Foot Air Cargo Sortation Warehouse
- o Fuel Farm
- o Access Road
- o Maintenance Building
- o Taxiway Connections to Runway 7/25
- o Taxiway Edge Lighting
- o Overlay Existing 1,000-foot Overrun Area on Runway 7 to Meet Stopway Criteria on an Interim Basis until Longer Term Development Actions are Complete
- o In-Slab Power Outlets at Aircraft Parking Stations
- o Exterior Lighting Associated with Sortation Facility
- o De-icing Facilities
- o Infrastructure, including but not limited to utilities, sewer lines and retention basin.

Phase 2 (To be Completed After Operations have Begun)

- o Extension of Primary Runway 7-25 and its North Parallel Taxiway

- o Category II Instrument Landing System

- o Construction of South Parallel Taxiway

The site of the ramp and sortation warehouse would encompass approximately 65 acres of land and would be constructed entirely on airport property. Most of the site of the proposed project is located south of the main east-west runway 7-25 and west of the north-south runway 16-34 (Exhibit B of the FEIS). However, some of the proposed development will occur on the west side of the airport, associated with the runway extension, and on the east side of the airport, associated with proposed drainage improvements. Exhibit C of the FEIS shows the airport layout plan, highlighting proposed improvements. Exhibit D of the FEIS shows the proposed cargo apron layout. Each of these plans have been submitted to FAA for airspace review (Airspace Case Nos. 89-AGL-935 and 89-AGL-938 NRA). Subsequent to the initial review, a revised apron layout was submitted to FAA for airspace review. The revised apron layout is reflected in Exhibit D of the FEIS.

Use of the facilities to be constructed as part of the Preferred Alternative would result in an increase in total airport operations and would modify the overall aircraft fleet mix. The air cargo hub operation would generate in the first year, approximately 13,832 additional operations at the airport. These operations are estimated to consist of 23 nighttime arrivals between 12:00 midnight and 2:00 a.m. (Tuesday through Saturday mornings) and 23 nighttime departures between 4:30 a.m. and 7:00 a.m. (Tuesday through Saturday

mornings). There would also be four daytime flights (Monday through Friday) generally arriving between 1:00 p.m. and 3:00 p.m. and departing between 4:00 p.m. and 5:00 p.m. On the weekends, two flights arrive at midnight (Saturday) and depart at 3:00 a.m. (Sunday). No appreciable change in annual operations or fleet mix is anticipated for the five-year period (1991-1995) after initial start-up of hub operations. This is attributable to excess capacity in the aircraft and truck fleet which will accommodate a 10% growth rate in overnight traffic over the five-year period because existing capacity is currently underutilized, because densification of cargo within containers is occurring through mechanization of sorting, because second day cargo can be off loaded onto trucks, and finally, because significant amounts of cargo that is shipped between locations on the west coast can be handled by direct movement and the same is likely to occur on the east coast. The existing fleet of 23 aircraft utilized by Burlington Air Express consists predominantly of 707-300, DC-8-63, 61, and 54 series, 727-100F and Convair aircraft with specific mix of aircraft varying slightly from time to time with changes in lift capacity requirements on given routes.

Due to comments received as a result of circulating the DEIS, Burlington Air Express was consulted to obtain a forecast of its expected fleet for the year 2000. BAX anticipates it will be operating a fleet of 26 aircraft. DC-8-63/73 aircraft will remain in the fleet mix; however, 727-200/100 will replace 707 aircraft. Of the 26 aircraft in the mix, 18 are anticipated to be 727 and 8 DC-8-63/73. Total operations by BAX in the year 2000 have been projected at 15,600.

IV. Alternatives

A variety of alternatives were examined in the FEIS to determine which were appropriate for detailed consideration by the FAA decision maker. They included:

1) CONSTRUCTION AND OPERATION OF AIR CARGO HUB AT TOLEDO EXPRESS AIRPORT (PREFERRED ALTERNATIVE)

The Preferred Alternative is described in detail on pages 2-2 through 2-5 of the FEIS and summarized in Section III Airport Development Proposed on the Airport Layout Plan found in this Record of Decision.

2) ALTERNATIVE AIRPORT GEOMETRIC CONSIDERATIONS

These alternatives ranged form the physical siting of the facility by utilizing the secondary runway during the nighttime hours for parking of air cargo aircraft to altered runway configurations to accommodate the facility with the least impact on the environment and existing/proposed navigation aids.

The alternative of utilizing the secondary runway for a ramp is described on page 2-7 of the FEIS. With this alternative, the secondary runway would be unavailable for use during the hours of operation of the air cargo hub. This alternative would present operational difficulties for other airport users and the sponsor, as well as the air cargo operator. In all likelihood, this alternative could only be considered as a temporary measure.

The other geometric alternatives consisted of runway

configurations and sitings that included the extension of existing Runway 16/34 to 12,000 feet, construction of a new 12,000-foot parallel Runway 7R/25L with a 4,300-foot separation from the existing Runway 7/25, construction of a new 12,000-foot Open-"V" runway, and extension of the existing Runway 7/25 to 12,000 feet. These are described on pages 2-8 and 2-9 of the FEIS, along with the conclusions. The alternate runway configurations were reviewed under the following criteria: operational demands, wind conditions (coverage), environmental impact, and cost. No configurations were found to be reasonable alternatives to the preferred configuration.

3) ALTERNATIVE DISTRIBUTION OF BAX TRAFFIC

Several alternatives were considered specifically to reduce noise over Oak Openings Preserve Metropark and Louis W. Campbell Nature Preserve. They are described on pages 2-10 through 2-13 of the FEIS. The alternatives consisted of adjustments to departure flight tracks and changes in runway use. None of the distribution alternatives identified would substantially remove noise from either Oak Openings Preserve or Louis W. Campbell Nature Preserve, and some distribution alternatives would increase noise over residential areas. For these reasons, flight track adjustment and preferential runway use were not considered to be reasonable alternatives and were not evaluated further in Chapter Four of the FEIS.

4) ALTERNATE AIRPORTS

Four alternative airports in the Toledo area were examined: Toledo Suburban, Metcalf Field, Wood County Airport, and Fulton County Airport. The discussion of these alternatives is on FEIS pages 2-14 and 2-15. These nearby airports can currently accommodate only small aircraft weighing less than 12,500 pounds. The costs, environmental impacts, and time that would be required to develop them into an air cargo facility ruled them out as reasonable alternatives.

Alternative airport locations outside the Toledo area are discussed on pages 2-15 and 2-16 of the FEIS. These include Baer Field in Fort Wayne, Indiana (Burlington's present hub), Rickenbacker Airport in Columbus, Ohio, and a general category of "other locations".

Baer Field was not considered to be a reasonable permanent hub alternative to the Toledo Express Airport because of Fort Wayne's lack of a competitive funding package and development plans for a permanent hub, the additional ground travel time to Burlington's automotive markets, the absence of a major highway connection to the airport, and a limited available labor pool. Additional discussion of the Baer Field alternative is found in Section VII of the Record of Decision under Issues.

Rickenbacker was not considered to be a reasonable alternative because it would entail significant additional cost to develop and operate it as a hub, would be less efficient than a new facility at the Toledo Express Airport, would result in a deterioration of service to Burlington's key markets, and has a history of environmental problems.

No other specific alternative locations outside the Toledo area have surfaced during the planning and environmental review process. In its earlier permanent hub search, Burlington had considered seventeen different airports in for Mid-West states. All were rejected in favor of Toledo because of Toledo's advantages. Without an expression of interest by Burlington in another location or the proposal of another candidate hub by an airport sponsor or the identification of another location as a desirable alternative during the planning process, the FAA is not reasonably able to identify other locations as reasonable alternatives to the Toledo Express Airport. It would be speculative for the FAA simply to pick other airports in the Midwest to evaluate and would generate unnecessary evaluation and paperwork without contributing value to the decision making process.

5) ALTERNATIVE OF NO ACTION

The No-Action alternative would result in Toledo Express Airport remaining largely as it is today. An air cargo hub would not be sited at the Airport. In the short term, Burlington's operations would remain at Fort Wayne, Indiana. Burlington would presumably renew its evaluation of various airports for purposes of establishing a permanent hub, and at some point request FAA approvals would be subject to appropriate environmental evaluation.

The No-Action alternative would avoid the introduction of new significant environmental impacts at the Toledo Express Airport that would accompany the Burlington cargo hub operation. This alternative would avoid the

increased noise levels over the residences surrounding Toledo Express Airport and over Louis W. Campbell Nature Preserve and Oak Openings Preserve Metropark.

However, the No-Action alternative would not provide substantial economic benefits for the Toledo Metropolitan Area, which according to 1989 statistics, has been the urban area of lowest economic growth when compared to all other major urban areas in the state of Ohio. The no-action alternative would mean foregoing a variety of economic benefits described on pages 2-13 and 2-14 of the FEIS.

The No Action alternative was considered a viable alternative by the FAA in the FEIS. It was the baseline environmental condition against which the environmental impacts in Chapter Four of the FEIS were evaluated.

Based on reasons discussed on Chapter 2 of the FEIS and summarized above, the FAA has concluded that there are only two reasonable alternatives relative to its decision making process in this situation. These alternatives are: (1) the Preferred Alternative of constructing and operating an air cargo hub at the Toledo Express Airport and (2) the alternative of No Action. Chapter Four of the FEIS analyzes the impacts of the Proposed Project and the No-Action Alternative.

The No Action alternative is environmentally preferable because it would avoid the introduction of new significant environmental impacts at Toledo Express Airport that would accompany the Burlington air cargo hub operation. The Preferred Alternative will result in some significant environmental impacts, particularly with respect to aircraft noise.

The affected environment in the vicinity of Toledo Express Airport and the environmental impacts of primary concern with respect to the establishment and operation of an air cargo hub are summarized in the next two sections of the Record of Decision.

The Preferred Alternative will provide an advantageous air cargo hub location for Burlington Air Express for reasons described in Chapter One of the FEIS. These reasons include financial arrangements, geographic location, airport facilities, ground transportation network, and local work force. For Toledo, the Preferred Alternative is desirable because of the economic benefits and employment opportunities which will be created by an air cargo hub.

The preferred alternative also permits the FAA to fulfill its mission of encouraging the establishment of cargo hubs and projects which increase airport capacity. The FAA has a statutory mission to support the development of air cargo hubs. Title I of the Airport and Airway Improvement Act (AAIA) Amendments states, "...cargo hub airports play a critical role in the movement of commerce through the airport and airway system and appropriate provisions should be made to facilitate the development and enhancement of such airports." and "...airport construction and improvement projects which increase the capacity of facilities to accommodate passenger and cargo traffic, thereby increasing the safety and efficiency and reducing delays, should be undertaken to the maximum feasible extent."

In fulfilling this mission, the FAA acts in cooperation with airport sponsors and air carriers. The FAA cannot direct or control the actions of either. Under the Airline Deregulation Act of 1978, no federal agency can direct Burlington to

establish its permanent hub at any particular airport. Similarly, under federal law, the FAA lacks authority to direct any airport to initiate development to accommodate a specific airline or air cargo operator.

While the FAA is not in a position to control or direct the actions and decisions of Burlington or of the T-LCPA, the FAA does have the ability to support or withhold approval for the proposed federal actions, including revision of the Airport Layout Plan and other federal actions discussed in this Record of Decision. The FAA's decision to support or not support this project is governed by considerations of the above stated statutory missions: the additional FAA statutory responsibility derived from the AAIA to review Airport Layout Plans for safety, efficiency, and utility; duties set forth in the Federal Aviation Act of 1958 concerning flight safety; the policy of supporting local airport operators' development plans and programs, to the extent consistent with Federal responsibilities; and the FAA's statutory environmental responsibilities under the National Environmental Policy Act of 1969 and other applicable environmental legislation.

Burlington Air Express has made the case to the FAA that its present air cargo hub operation at Baer Field in Fort Wayne, Indiana is inadequate and that development of a hub at the Toledo Express Airport would provide an enhanced cargo operation, for reasons previously cited, beyond that which would be achievable at Baer Field. This is a business decision on the part of Burlington, in which the FAA has not been involved. The airport operator, T-LCPA, is fully supportive of Burlington's decision because of the previously cited economic advantages which would accrue to community and has undertaken extensive airport development planning

and environmental evaluation to support the airport development and other FAA approvals which are necessary to enable the establishment and operation of this new hub.

The FAA is inclined to support Burlington's and the airport operator's plans for an enhanced air cargo hub at the Toledo Express Airport unless there are overriding safety, environmental, or technical reasons why the FAA should not do so. The FAA has completed appropriate aviation technical reviews and has concluded that the air cargo hub proposal can be implemented at the Toledo Express Airport consistent with consideration of safety, efficiency, and utility. The FAA has also completed appropriate environmental reviews in the FEIS and summarized in this Record of Decision -- the impact of primary concern being the introduction of substantial noise from nighttime air cargo operations. However, the FEIS and this Record of Decision also include substantial mitigation commitments which would be carried out to minimize the impacts to the extent practicable. Given the projected scope and magnitude of the environmental impacts and the environmental mitigation commitments the FAA has found no overriding environmental reason to deny this air cargo hub proposal. The No Action alternative was neither so clearly superior to that proposed by the T-LCPA, nor were the environmental impacts of the proposed action so severe, as to warrant disapproval of the federal actions discussed here. Based on all of the above considerations, the FAA has decided to support the proposed project as the preferred alternative.

V. Affected Environment

Toledo Express Airport is located within Swanton and Monclova Townships, Lucas County, Ohio. The selected

study area incorporates portions of two counties, Lucas and Fulton. The Lucas County portion consist of all of portions of six unincorporated townships: Harding, Monclova, Spencer, Springfield, Swanton and Waterville Townships. Also, included in the Lucas County portion of the study area are the Villages of Holland and Whitehouse. In Fulton County, the study area includes portions of Swan Creek Township and the Village of Swanton.

The area of Lucas County surrounding Toledo Express Airport has experienced a net population gain of over 60% since 1960. Large net gains occurred in Monclova, Springfield and Waterville Townships, and in the Village of Whitehouse. Significant losses have occurred in Harding and Spencer Townships, while Swanton Township and the Village of Holland have remained relatively constant. In Fulton County, west of the airport Swan Creek Township, exclusive of the Village of Swanton have increase over 112% since 1960, while the Village of Swanton has increase over 80%.

The current land use map shows most of the study area is currently undeveloped for urban uses. Vacant area, agriculture, and woodlands constitute about 75% of the study area. Agriculture is the dominant use in the Fulton County portion, and woodland and agriculture are the dominant uses in the Lucas County portion.

Residential development comprises 4-5% of the study area, almost exclusively along the county highways in a square mile grid. This forms a lattice work of strip development throughout the study area. Large tracts of interior properties potentially could be developed for residential subdivision with the development of access streets off existing county roads. However, this is not likely in the near future in the

immediate vicinity of the airport, particularly southeast and southwest of the airport, because of the continued availability of land along the county roads that already have access. Also lacking, are sewer and water, and the demand for subdivided land that attract most developers to establish subdivisions requiring upfront money for development of access roads.

Commercial and industrial lands, most of which includes the airport, comprise 4-5% of the study area. Some commercial and industrial development is concentrated in Holland and Swanton, located northeast and west of the airport, respectively. An industrial park is located directly north of the airport. Other commercial development is located along S.R.2 and at intersections of county roads. Most of the rural commercial and industrial development consists of agricultural services and auto parts and salvaging.

Open-space and recreation category lands make up about 9% of the study area. The vast bulk of these lands are comprised of the Oak Openings Park and Maumee State Forest lands situated southwest of Toledo Express Airport. These lands also include the Louis W. Campbell Nature Preserve, just east of the airport.

Transportation and utility rights-of-way constitute an additional 8% of the study area. The most prominent transportation feature in the area is the east-west corridor containing the Ohio Turnpike, S.R.2, the Conrail main line, and the Holland and Swanton local street systems.

VI. Environmental Considerations and Mitigation

This section summarizes the environmental impacts of

primary concern and the mitigation commitments. All environmental impacts are thoroughly analyzed in Chapter Four of the FEIS.

In accordance with 40 CFR 1503.3, the FAA will take appropriate steps, through grant assurances and conditions, property releases, airport layout plan approvals and contract plans and specifications, to ensure that following mitigation actions are implemented during project development, and shall monitor the implementation of these mitigation actions as necessary to assure that representations made in the FEIS with respect to mitigation are carried out. Mitigation commitments made by the T-LCPA must be carried out, with or without Federal funding.

The FEIS includes a summary of mitigation actions starting on page 5-2. Practical means to avoid or minimize environmental harm and where applicable, identification of adopted monitoring and enforcement programs are summarized below:

a. Noise and Land Use Impacts.

Significantly increased noise at night will be experienced by residential areas and two nursing homes in the area. A total of 2,184 additional people are impacted by noise with the start-up of the proposed project. Sixty percent of these are within the 65-70 Ldn range, 22% are within the 70 -75 Ldn range, and 18% are in the area exceeding 75 Ldn. The runway extension will create an increase of 286 persons exposed to 65-70 Ldn levels, a decline of 16 persons in the 70-75 Ldn range and 16 fewer persons impacted at levels exceeding 75 Ldn. An additional nursing home and portions of a mobile home park will also fall within the 65-70 Ldn

level after the runway is extended, but both are already impacted by ambient noise from the Ohio Turnpike equalling or exceeding the noise impacts from proposed aircraft operations. Schools and churches affected by increased Ldn noise levels are not considered to be significantly impacted since they are not in use during the hours of most of the cargo hub operations.

Mitigation

(1) A property acquisition and relocation plan will be implemented for all properties falling within the 75 Ldn noise level, and a few properties in the 70-75 Ldn area. A total of approximately 100 homes are expected to be involved. Two nursing homes fall inside the 75 Ldn area and these will also be acquired and the residents relocated. This latter action is discussed in more detail under b. Social Impacts.

Acquisition of property will begin with those properties needed for construction for development of a permanent new access road to the sortation facility site. At the same time, the noise-impacted properties within the 75 Ldn noise contour and those properties in close proximity to the 75 Ldn line will be acquired. The Port Authority has assured FAA that it will acquire those properties identified above, and will purchase the properties of owners who wish to be relocated, on a priority bases by demonstrated need. The other properties slated for acquisition, including those necessary for Phase 2 development (runway extension), will be acquired as soon as possible thereafter. As indicated on page 4-39 of the FEIS T-LCPA has advised FAA that it intends to accomplish the proposed acquisition and

relocation of the area in a period of three years. If funding is available, it can be accomplished in an even shorter period because there is adequate replacement housing available.

(2) The T-LCPA also commits to implement a sound attenuation program or noise and avigation easement purchase for dwellings within the 65-75 Ldn contour areas. The sound attenuation or easement acquisition program will be staged to move outward from the areas of highest noise exposure down to the 65 Ldn contour. The sound attenuation program is recommended for potentially 796 homes: 172 in the Ldn 70-75 contour range and 624 in the Ldn 65-70 range, under the worst-case scenario presented in the FEIS for the 1991-1995 period. Further information in this regard is found on pages 4-33 through 4-35 of the FEIS, with cost estimates in Table 4-13 on page 4-35.

The recommendation of the Part 150 Study will provide valuable input on timing and priorities in this program and may reduce the total number of homes which need to be sound attenuated. However, the areas of highest noise exposure are least likely to change with the Part 150 recommendations. Where appropriate, the acquisition of noise and avigation easements may be considered as an alternative to sound attenuation. This could occur where outdoor-to-indoor sound level attenuation to meet design objectives can't be achieved.

The above mitigation commitments, along with those identified under b. Social Impacts, when fully implemented will eliminate almost all existing noncompatible land uses within the 65 Ldn noise contour.

T-LCPA initiated a noise compatibility study in 1988 following the provisions of Federal Aviation Regulation Part 150 (FAR Part 150). The purpose of the study is to identify a balanced and cost effective program to reduce the noise impacts for both existing and future conditions. The Part 150 Noise Compatibility Program will include the consideration of airport/aircraft operational noise reduction actions and land use controls. The T-LCPA has committed to modify the scope of its Part 150 Study to include the Ldn 60 contour area. The FAA commits to provide financial assistance to T-LCPA to broaden the Part 150 Study scope to include the 60 Ldn contour. The T-LCPA has assured FAA that it is committed to complete its Part 150 Study in an expeditious manner as closely as possible to the target date of the Fall of 1990, and to submitting the program to FAA for approval. The FAA commits to act on the Port Authority's Part 150's Noise Compatibility Program (NCP) as expeditiously as possible.

The Part 150 Study will include the evaluation of potential noise abatement benefits of flight track measures. Flight track evaluation will concentrate on reducing noncompatible land uses within the 65 Ldn contour, but will also consider corridors that extend beyond the 65 Ldn contour. Upon Part 150 approval by the FAA, T-LCPA has made a commitment to FAA that it will implement all operational items contained in the approved NCP that are within the authority of the T-LCPA, subject to existing contractual requirements which the T-LCPA has with the airlines and air cargo operators serving the Airport.

Properties within the 70-75 Ldn noise contour not currently scheduled for acquisition, including vacant residentially zoned property, will be examined as part of the Part 150

Study to determine if these are remnants of neighborhoods which also should be purchased. The particular focus of this portion of the Part 150 Study will be Mescher Drive, Girdham Road and Whitehouse-Spencer Road. Further, as part of the Part 150 Study, the total parcel assemblage will be studied in a preliminary manner to convert the properties into those which provide compatible land use with the airport. These properties could be acquired within the tolerance of the land use plan emerging from the Part 150 Study and then resold, retaining the appropriate covenants or easements to assure long-term compatibility. Also, inherent in the acquisition of properties is the need to be flexible in the assemblage of properties, so that parcels needed to effect a complete assemblage may be acquired. This proposed land use strategy would allow the return of excess properties not needed for aeronautical activities and airport development to the tax rolls.

b. Social Impacts.

The principal social impacts associated with project are related to the acquisition of existing homes and the relocation of residents. This was discussed earlier under a. Noise and Land Use Impacts. However, the acquisition and relocation of the two nursing homes will be discussed in this sub-section, because of the additional concerns regarding transfer trauma. The T-LCPA has met with the affected nursing home owners and operators, in order to fully understand their respective needs and desires because of the establishment of an air cargo hub at Toledo Express Airport. The owners and operators of the nursing homes have expressed a desire to relocate.

The Toledo-Lucas County Port Authority produced a detailed

Relocation Plan for the project, which was a companion document to the FEIS. The Relocation Plan provides details on exact number of people involved, household characteristics, housing tenure, and minority status.

Mitigation

(1) Provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies of 1970 (P.L. 91-646) as amended by the Uniform Relocation Act Amendments of 1987 (P.L. 100-17, 101 Stat. 246-256), 49 CFR Part 24 will be met in the Relocation Plan, which will be reviewed and approved by the FAA.

FAA has received assurance from the T-LCPA that the owners/operators want to relocate the nursing homes outside of the 65 Ldn noise contour of the project area, while at the same time relocating them in the same general geographical area. Therefore, the noise mitigation plan calls for the relocation of the Villa West and Monclova Care Center nursing homes.

(2) The T-LCPA will retain the appropriate relocation experts and an experienced consulting firm and/or project management firm with known expertise in the construction and operation of nursing homes to effectuate the construction of the homes and the movement of residents. These experts will also provide assistance for the respective transferring of the certificate of need and also incorporate the business owners and operators' personnel and operational needs into the overall relocation plan.

(3) It is held by some medical and psychological

experts that the phenomenon of transfer trauma can be minimized or eliminated by creating a positive environment for the relocation and giving those affected something to look forward to during and after the relocation. The owners and operators, as well as key staff personnel, would be part of a team formulating the best strategy for the move.

It is proposed that a "relocation team" be established to plan, implement, control and complete the relocation of the nursing homes. It is the position of the T-LCPA that this be given top priority. Members of the "relocation team" will include the nursing home owners, operators, administrators, key professional staff, the T-LCPA, representatives and local geriatric "experts" who have already expressed an interest in assisting this project. FAA will provide advice as it applies to requests for funding. It is further anticipated that the "relocation team" be formed immediately after the Record of Decision is signed.

FAA has been assured by T-LCPA that it intends to initiate appropriate mitigation in this regard as soon as possible after a Record of Decision is rendered. The objective would be to have mitigation completed before or shortly after start-up of operations of Burlington Air Express. However, it is recognized that there are actions for implementation of this mitigation outside of the Port Authority's control that could delay accomplishment of the mitigation in such a short time frame. Nevertheless, it is expected to be completed within three years.

c. Induced Socio-economic Impacts.

For the first full year of operation, it is expected that 750 permanent jobs (150 full-time, 600 part-time) would be created at the hub with a base payroll of about $9 million. Permanent jobs are expected to increase to 850 the second year of operation and to 1,000 the third year of operation. It is anticipated that as a result of the new hub, 150 airport-related jobs also would be created. These jobs would be directly related to supporting the hubs's operations--fuelers, aircraft operators, maintenance facility personnel, etc.

An economic study for the Toledo-Lucas County Port Authority by the University of Toledo in 1989 evaluated the economic impacts associated with Toledo Express Airport. According to the study, the proposed air cargo hub is expected to contribute roughly 17 million dollars to the local economy per year out of a total economic impact for the airport (including the hub) of $42,119,636 for the first full year of hub operations. This figure is comprised of $26,490,337 in direct and indirect economic impact and $15,629,299 in induced impacts. By the third full year of operation of the air cargo hub, total economic impact associated with the airport is expected to rise to $67,628,322. According to the study, because the analysis assumed a no growth mode for the airport, with the exception of the air cargo hub, and because the mean multiplier of .59 was utilized, these projections are considered conservative.

d. Water Quality.

The Airport is served by two drainage basins: Gale Run Ditch and Zaleski Ditch which are characterized as containing fair water quality. The proposed projects will affect stormwater runoff levels from the Airport. Runoff associated with completion of the overall development program will

require additional storage capacity. To address the glycol pollution, meet the NPDES Permits and mitigate stormwater runoff, T-LCPA will implement a stormwater runoff project. T-LCPA will accommodate the additional runoff associated with the cumulative development through modification of the airport retention and drainage system. The proposed stormwater runoff mitigation program includes mitigation of the hydrological functions that will be lost due to the filling of approximately 33.7 acres of wetlands as well as paving over or the building of structures on site. Mitigation is described below in reference to the phases of development.

Mitigation

(1) Phase 1 Mitigation consists of a drainage system that incorporates features to protect Zaleski Ditch downstream from potential fuel spills and glycol de-icing fluid.

a) All runoff on the apron will be collected in a central drainage system. The system will incorporate a series of continuous inlets (trench drains) located on either side of the central taxilane. The inlets will be connected to a subsurface storm drain system flowing from west to east.

b) An oil/glycol diversion structure will be installed at the east end of the storm drain system. The structure will feature a baffle/weir arrangement to divert all low flow runoff into an oil/water separator. During significant storm events, the baffle/weir arrangement will trap any oil contained in the apron runoff. As the peak flows subside, the oil/water mixture will be diverted into the separator.

c) Glycol will be used to de-ice aircraft immediately before departure. Glycol laden runoff will be collected in the storm drain system and diverted directly into the sanitary sewer system for treatment. The diversion will be accomplished by an electronically controlled valve located between the diversion structure and the oil/water separator. The valve will be manually activated from the sort facility whenever de-icing operations are occurring, in order to prevent any glycol mixture from entering the ground water system. As de-icing fluid is normally used during periods of freezing rain/snowfall, there will likely be some stormwater runoff associated with de-icing fluid. The diversion structure is sized to divert the melt runoff equivalent to 3/4 inches of snow per hour into the sanitary sewer system.

d) Stormwater quantity control will be accomplished in a new outlet ditch located downstream of the oil/glycol collection system. A reinforced concrete outlet structure will provide temporary ponding in the outlet ditch. The outlet structure will feature appropriately sized orifice and weirs to maintain post-development peak discharges to levels at below pre-development discharges. The structure and ditch will be sized to accommodate the 2-, 5-, 10- and 100-year storm events.

(2) Phase 2 Mitigation consists of a drainage system that incorporates features to ensure downstream protection of existing surface and groundwater resources in the Gale Run Ditch drainage basin from the construction of the 3,300 foot extension of Runway 7/25, north parallel taxiway and future south parallel taxiway. These development projects will add approximately 26 acres of new impervious area to the Gale Run water-

shed. Additional changes to the hydrologic characteristics of the area will include the removal of existing wooded areas to protect the approach to the extended runway. These changes will result in an increase of storm water runoff from the project area. The quality of this stormwater should not be significantly impacted by construction of the runway extension. De-icing operations (glycol) will not occur in this area, but will be accomplished on the cargo apron which has provisions for containing de-icing fluid. Icing conditions on runways will be controlled with the use of sand to increase friction and on occasion urea to melt the ice. Neither of these items are expected to travel a significant distance from the runway. Flow will not be to storm sewers but instead flow overland to drainage ditches or culverts. Oil and grease drippings from ground support vehicles commonly found within aircraft apron pavement areas but not allowed on the runway/taxiway, is highly unlikely to result in oil contamination of stormwater runoff. No fueling operations will occur on the runway and/or taxiways either.

a) A stormwater management basin will be constructed downstream of the project area. A reinforced concrete outlet structure will provide temporary ponding during peak storm events in the basin (wetland) and will also maintain proper soil moisture conditions if a new wetland is established in conjunction with it. The structure will incorporate a series of orifices and weirs to maintain post-development peak discharges to levels equal to those which exist today. The structure and basin will be sized to accommodate the 2-, 5-, 10- and 100-year storm events.

b) The quality of stormwater runoff from the new paved areas will also be maintained by the use of vegetative practices. The basic design configuration of airports with large, wide, relatively flat (one to three percent slope) grassed areas adjacent to runways and taxiways provides for vegetative filtration of pavement runoff. Sheet flow off the new pavement will travel across at least 150 feet of grassed "filter strips" prior to entering the surface drainage system. In addition, the conceptual design of the project include the creation of at least 10 additional acres of wetland over that amount which exists today. Wetland are well known for their ability to filter waterborne pollutants from surface runoff. The proposed stormwater management quantity control basin will also provide qualitative improvements for storm-water runoff. As the basin could also be a forested wetland, runoff detained in the basin could be shaded from directed sunlight. This will help to mitigate any thermal impacts resulting from the pavement runoff.

c) Protection of the existing wetlands and downstream watershed will be provided through the use of modern sediment and erosion and control techniques throughout construction. Runoff from all disturbed areas will be directed into several temporary sediment basins located throughout the project area. The basins will be sized to accommodate 1,800 cubic feet per acre of disturbed land (1/2 inch of runoff or approximately 1 inch of rainfall). Underdrain type outlet structures will allow stormwater to slowly drain out of the sediment basin allowing for waterborne sediments to settle out. All sediment basins will be periodically cleaned to remove the trapped sediment and re-establish proper storage volume.

e. DOT Section 4(f) Lands.

The proposed development will have no significant impact on the Louis W. Campbell Nature Preserve located east of the airport. This preserve owned by the state is open to permitted users during daylight hours. Since the increased aircraft noise associated with the proposed project would occur primarily at night, when the preserve is closed to permitted users, no effects on the normal activity or aesthetic value of the preserve are anticipated due to implementation of the proposed project. Likewise, there will be no significant impact on the Maumee State Forest and All Purpose Vehicle and Snow Mobile Area which is located over four miles southwest of the airport and is situated entirely outside the 65 Ldn noise contour associated with the proposed project.

However, there will be a significant adverse effect on the nighttime use of primitive campground within the Oak Openings Preserve Metropark from early Tuesday morning (Monday night) through early Saturday morning (Friday night). The campground, Springbrook Group Camp, is designated for tent camping and would be impacted by noise at 70 Ldn. FAA coordinated a Section 4(f) documentation package with the Department of Interior (DOI) and the results of this coordination are summarized in the letter dated April 13, 1990, from DOI, included in Appendix E of the FEIS. DOI concurs with proposed relocation of the Springbrook Group Camp within the Oak Openings Preserve Metropark to minimize harm to park land, and has no objection to FAA's Section 4(f) determination on the project with regard to the Springbrook Group Camp. The FAA concluded in the Section 4(f) documentation package, concurred in by DOI, and in the FEIS that there is no feasible and prudent alternative to the use of 4(f) land and

that the project includes all possible planning to minimize harm.

Mitigation

(1) The T-LCPA has made a commitment to FAA that it will provide funds for the establishment of a new primitive campground of equal size as the one impacted. The T-LCPA is coordinating with the Metroparks representatives to relocate this facility to another location within the property, outside the identified 65 Ldn noise contour area.

(2) The T-LCPA has also made a commitment to monitor the noise at the potential locations to find the optimum site for the campground replacement.

The Metro Park will still be able to utilize the existing primitive campground during high usage periods on the weekend (On Saturday nights there are limited nighttime air cargo flights).

f. Endangered Species of Flora and Fauns.

The proposed development will not affect endangered or threatened species of flora and fauna on Federal lists. However, it will have the potential to affect state listed flora and fauna located on the airport, which are scarce within the State of Ohio, but which are often quite plentiful in adjacent states. T-LCPA has a good working relationship with the Ohio Department of Natural Resources (ODNR) to protect state endangered species on the airport and has developed a mitigation plan in this regard.

Mitigation:

(1) Final grades on bare sand will, whenever possible, the mulched of seeded with native vegetation to prevent the introduction of aggressive non-native grasses that could crowd endangered flora. In constructing the north taxiway, all woody vegetation will be removed throughout the site and the stumps treated in order to provide additional suitable habitat for the rare herbaceous plant species growing there.

(2) State endangered plants located in the Maumee-Western Sand Barrens North site will be moved before construction of the north taxiway.

(3) The T-LCPA has committed to use habitat management techniques recommended by the ODNR for the preservation and propagation of rare plant and animal species which occur at the airport, to the extent that such species and/or habitat management would be compatible with airport operations and the mandates of the FAA to reduce wildlife/aircraft strike hazards. T-LCPA will identify one or more individuals who will be responsible for coordinating with the ODNR and for overseeing grounds maintenance activities. These habitat management techniques are included within the ODNR Inventory, dated December 1989, Appendix H of the FEIS.

g. Wetlands.

The proposed development in Phase 1 of the project do not impact jurisdictional wetlands. Phase 2 of the project, which

includes the proposed runway extension and the parallel taxiways will disturb and require the grading, clearing, and/or filling of approximately 33.7 acres of undeveloped wetlands. Therefore, the airport sponsor will require a permit for Phase 2 improvement from the U.S. Army Corps of Engineers pursuant to Section 404 of the Clean Water Act.

Detailed information about approximately 27 acres of the wetlands that will be impacted by Phase 2 improvements is in the FEIS on pages 4-59 through 4-66 and in Appendix F, and need not be repeated here. Approximately 6.7 acres of additional impacted wetlands in the area west and south of the runway extension and south taxiway were not identified in the FEIS based on FAA's understanding that the area had been surveyed and determined not to contain wetlands. The area was subsequently surveyed again on June 18, 1990. The result of the survey are contained in the Wetland Delineation Report and Preliminary Mitigation Plan, as revised June 1990, attached to this Record of Decision by reference in Attachment IV. The additional acreage does not result in significant differences in the wetlands impacts evaluated in the FEIS and does not trigger requirements under 40 CFR 1502.9 (c)

The FAA evaluated alternative airport layout plans to determine whether there were feasible and prudent alternatives to wetlands impacts that would avoid or minimize such impacts. An alternatives analysis specific to wetlands is provided in Appendix F of the FEIS on pages 11 through 13.

As a result of this analysis the south parallel taxiway was relocated to avoid the wetlands in the Gales Run Ditch. However, the standard design criteria for the location of the runway extension and parallel taxiways severely limited any

further adjustments to proposed location of this construction. The necessity for building the north parallel taxiway extension and the south parallel taxiway was examined and it was determined that they are required for safety and efficiency purposes. Without the north parallel taxiway extension, planes wishing to utilize the full capability of the runway extension would have to back taxi on an active runway until the south taxiway is built. If the south parallel taxiway was built first, the back taxing could be avoided; however, elimination of the north taxiway extension would require passenger aircraft departing from the terminal to cross the active runway and use the south parallel taxiway. Likewise, if only the north parallel taxiway were built, air cargo aircraft would have to cross the active runway, mostly at night when visibility is limited, to use the north taxiway. It is FAA's policy to encourage full length parallel taxiways to minimize the crossing of active runways and their inherent potential for unauthorized crossings which increase the opportunity for aircraft collisions. The remaining impacts are unavoidable, and no feasible or prudent alternatives exist to avoid the impact to these wetlands.

As the Phase 2 elements will cause the filling or disturbing approximately 33.7 acres of wetlands, the mitigation measures listed below have been proposed. They incorporate recommendations made by U.S. EPA and other natural resource management agencies. Because mitigation is being provided on 1.5:1 ratio, approximately 50.6 acres of land for wetland mitigation are needed to mitigate these wetland impacts.

Mitigation

(1) Three basic alternatives for mitigation of wetland

impacts are being considered.

a) On-site replacement (i.e; within the airport boundary) at a ratio of 1.5:1, with replacement of the open water habitat (incompatible with airport operations) in the form of a monetary contribution to a wetlands creation project in Swan Creek watershed being considered for construction by Toledo Metropolitan Area Council of Governments and Ohio EPA. The proposal of monetary contribution in lieu of actual mitigation was criticized by several agencies, and additional documentation would be needed to show why it should be allowed. Also, the on-site mitigation must show how enhancement of the existing sites is viable, i.e. enhancement will substantially increase their value.

b) Acquisition of land off-site near Maumee State Forest for creation/restoration of a wetland within the same watershed, at a replacement ratio of 1.5:1. This would be in cooperation with the Ohio Department of Natural Resources (ODNR). T-LCPA in a letter dated June 22, 1990, requested ODNR to consider such a cooperative venture. In a letter dated July 3, 1990, ODNR agreed to consider this option. Both of these letters are attached to the Record of Decision [by reference] in Attachment III.

c) A combination of on-site replacement and acquisition of land off-site near Maumee State Forest for creation/restoration of a wetland within the same watershed, at a replacement ratio of 1.5:1. This would combine the best aspects of alternatives a. and b. above.

(2) T-LCPA has committed to submit an overall mitigation plan to U.S Army Corps of Engineers, U.S. EPA, U.S. Fish and Wildlife, Ohio EPA, Ohio Department of Natural Resources and any other agency deemed appropriate. This wetland mitigation plan will outline the plans for creation/restoration of approximately 50.6 acres of wetlands to replace the approximately 33.7 acres of wetlands which will be filled or disturbed by the proposed development.

(3) Due to the timing and sequencing of construction activities, several Section 404 permits may be required for the phased actions at the Toledo Express Airport. For each permit application, a separate mitigation plan is to be submitted detailing the restoration activities and sequencing of activities to be implemented indicating how these activities are consistent with the overall mitigation plan outlined above. After approval of the mitigation plans, and issuance of the 404 permits; work on the wetlands replacement will be commenced before or at least concurrent with associated development on the airport.

(4) Currently, the wetlands at the airport provide water storage functions. T-LCPA has indicated to FAA that it commits to undertake the proposed stormwater runoff mitigation program described above under e. Water Quality, which includes mitigation of the hydrological functions that will be lost due to the filling of approximately 33.7 acres of wetlands. T-LCPA certifies that the proposed stormwater runoff mitigation program includes mitigation of the hydrologic functions that will be lost due to the filling/disturbing of approximately 33.7 acres of wetlands.

(5) As part of the mitigation plan, T-LCPA commits to submit an annual report to U.S. EPA, the Corps of Engineers, the U.S. Fish and Wildlife Service, Ohio Department of Natural Resources, Ohio EPA and other affected agencies. This report will describe the actions implemented and the results of these activities for each individual phase of the mitigation efforts. These reports are to be submitted for review on each phase of mitigation on an annual basis for five years after each restoration project has been completed. Therefore, the final five year submittal will occur five years after the final mitigation plan has been approved.

Although the T-LCPA originally proposed on-site mitigation, in response to comments from U.S. EPA in its June 14, 1990, letter and from others, the airport sponsor is now evaluating the use of land adjacent to Maumee State Park and some combination of on-site and off-site mitigation.

On-site mitigation allows wetlands to be developed within the same immediate watershed, which prevents significant changes in water quality. This is especially important on the extension of Runway 7/25 project as runoff into Gale Run feeds the Oak Openings Preserve Metropark further downstream. On-site mitigation also preserves the ecology of the site, while minimizing the hazards of wildlife/bird strikes. As an on-site area, Mitigation Site 4 in particular merits further study. Its separation from the runway and taxiway areas by a substantial tree line enables it to provide significant water quality benefits without increasing the safety hazard.

Off-site mitigation would enable creation of a wetland without any constraints associated with bird/animal strike

hazard. However, maintenance of water quality and preservation of the ecology of the airport area could be compromised more than with on-site mitigation.

h. Floodplains.

The proposed project's Phase 1 improvements (ramp, sorting facility, etc.) located in the Zaleski Ditch drainage area are outside of the boundaries of the 100-year floodplain. However, the proposed project's Phase 2 improvements (runway extension and north and south taxiways, etc.) would occur in an area of Gales Run Ditch currently designated, according to the Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps (FIRM), as a 100-year floodplain. These impacts are unavoidable as there are no prudent alternatives on the airfield. The defined limits of disturbance of the runway and taxiway extensions have been engineered to minimize impact on the 100 year flood plain. The 100-year peak flow after completion of the runway extension and associated improvements is estimated to be 100 cubic feet per second.

The following conceptual drainage mitigation plan is proposed to prevent damage to the runway extension and north and south taxiway improvements due to the existence of the floodplain, to prevent standing water from affecting radar coverage, to prevent impacts to the existing physical, biological and human environment as a result of construction within the floodplain, and to detain the excess stormwater resulting from the increase in impermeable surfaces. More detail in this regard, particularly impacts on water quality, is found under stormwater mitigation in item e. Water Quality above.

Mitigation

(1) New drainage ditches and culverts will be constructed to transmit water under the runway, taxiways and their associated safety areas.

(2) A stormwater management basin will be constructed to accommodate approximately 10 acre feet of storage. Also, a reinforced concrete outlet structure will be constructed on Gales Run Ditch just before it goes under Alternate U.S. Highway 20. It will incorporate a series of orifices and weirs to maintain post-development peak discharges to levels equal to those which exist today. Both the structure and basin will be sized to accommodate the 2, 5, 10, and 100-year storm events. The drainage system will be designed so that no increase in flows downstream are experienced from the construction of the proposed facilities.

i. Light Emissions.

The proposed development will increase the level of airport lighting on or around the proposed cargo ramp, access road, sorting facility, automobile and truck parking areas and navigation aid lights. This increased lighting could have an adverse on-airport impact with respect to vision of pilots and personnel in the air traffic control tower. Also, off-airport adverse impacts could result from fugitive light emissions interfering with astronomy and astrophotography activities in Oak Openings Preserve and intruding on residential properties at the north end of Whitehouse-Spencer Road.

Some of the potential impacts will be lessened on nearby residences by screening of existing vegetation. Others

impacts will be avoided by the scheduled acquisition of some residential properties for noise purposes. However, the following specific mitigation will be undertaken by the Toledo-Lucas County Port Authority to minimize fugitive light emissions.

Mitigation

(1) All ramp and sorting facility lighting will be shielded and aimed to direct light at the sorting building and its immediate perimeter and work area.

(2) Automobile parking lot lights, or any lights located along the access road into the facility will have high pressure sodium, cobra head with semi-cut off to minimize light scattering. Truck parking lot lights will have a useable range of 150 feet.

(3) Any specific problem with light emissions that arise will be handled on a case by case basis by shielding or adjusting the angle of the lighting equipment.

j. Construction Impacts.

The proposed development will cause short-term construction impacts. Many of these impacts, however, will be minimized through inclusion of pollution mitigation measures in the construction specifications.

MITIGATION

(1) Toledo-Lucas County Port Authority will ensure that all construction will be accomplished in accordance with FAA Advisory Circular 150-5370-10A, Temporary

Air and Water Pollution, Soil Erosion, and Siltation Control, Item P-156. Protection of the existing wetlands and downstream watershed will be provided through the use of modern sediment and erosion control techniques throughout construction.

a) Runoff from all disturbed areas will be directed into several temporary sediment basins located throughout the project area. The basins will be sized to accommodate 1,800 cubic feet per acre of disturbed land (1/2 inch of runoff or approximately 1 inch of rainfall). Underdrain type outlet structures will allow stormwater to slowly drain out of the sediment basins, allowing for waterborne sediments to settle out. All sediment basins will be periodically cleaned to remove the trapped sediment and re-establish proper storage volumes.

b) Sequencing of the earth moving activities will also be used to minimize potential impacts during construction. In accordance with recommendations from the Ohio Department of Natural Resources, work areas will, whenever possible, be mulched where final grades are on bare sand or seeded with native vegetation to prevent the introduction of aggressive non-native grasses. This will be done immediately upon completion to minimize the total amount of disturbed area at any one time.

(2) Protection of existing wetlands located outside of the grading limits will be accomplished by the use of physical barriers. The initial work items will include installation reflective (orange) plastic mesh fencing along the work limits adjacent to existing wetlands. The fencing will provide both a visual and physical

barrier to keep men and equipment from accidentally straying beyond the work limits.

(3) Construction access roads will be built as depicted on Exhibits W, X, and Y and in narrative on pages 4-71 and 4-72.

VII. Issues

The question of whether to expand facilities at Toledo Express Airport to allow the establishment of an air cargo hub as proposed is only a recent occurrence. It came about at the time the airport had already begun an update of its Master Plan. It is a question that involves matters of public policy in terms of social, economic and environmental issues. In addition, it is a question of which there has been considerable public controversy (both positive and negative) generated by persons living around the airport.

Some of the more significant concerns that have been expressed by various commentors and subsequently addressed in either the FEIS and/or this Record of Decision include:

Purpose and Need

Adequacy of Analysis of Alternative Sites

Sufficiency of the Noise Analysis

Mitigation Commitments

Thoroughness and Depth of the Air Quality Analysis

Adequacy of the Wetlands Analysis

Relationship of Sponsor/Sponsor's Consultant to EIS Preparation

Need for Revision and Recirculation of EIS

Detailed responses to comments in this regard are found in Attachment III to this Record of Decision. Responses to these concerns are also found under various headings in the Record of Decision.

Comments were received on the FEIS from Federal, state and local agencies and several individuals associated with Citizens Against Burlington (CAB). Attachment III to this Record of Decision responds to these concerns in greater detail.

After considerable deliberation, FAA has made the following determinations listed below for several key concerns regarding additional analysis and mitigation items which FAA was requested to consider.

PURPOSE AND NEED

Local commentors have questioned the need for Burlington Air Express to relocate its cargo hub from Baer Field in Fort Wayne, Indiana, to Toledo, Ohio, and have questioned the appropriateness of the Federal governments's lending its support to such a proposal. This issue has generated a number of specific comments and objections which are addressed in more detail in the Response to Comments on the Draft EIS found on pages C-11 through C-13 of the Final EIS, and Response to Comments in Attachment III of this Record of Decision.

The demand for this project is clearly based on a business decision by Burlington Air Express and the interest of a local airport sponsor, the Toledo-Lucas County Port Authority, in accommodating and facilitating this decision. This is not a particularly unique set of circumstances. Major airport development throughout the United States is driven by business decisions of air carriers, cargo, and corporate users combined with local airport sponsors' interests in expansion.

The FAA had no involvement in either Burlington's decision making process or in the Port Authority's decision to accommodate Burlington's operation. These decisions were reserved to the private sector and to local government. The FAA's involvement has arisen because a number of Federal actions, which are within the FAA's purview are required in order for Burlington and the Port Authority to be able to implement their decisions. The Port Authority, as the airport sponsor, made appropriate application to the FAA with respect to the necessary Federal actions. When presented with a viable proposal by a responsible applicant, the FAA initiated the appropriate evaluations. The FEIS clearly describes the proposal and the relevant Federal actions. This Record of Decision discusses the factors which have contributed to the FAA's decision.

ADEQUACY OF ANALYSIS OF ALTERNATIVES SITES

Several commentors claimed that the consideration of alternatives in the FEIS was inadequate because Baer Field in Fort Wayne, Indiana and Rickenbacker Airport in Columbus, Ohio were not evaluated in detail. As explained in the Responses to Comments in the FEIS, page C-16, additional information about alternatives was included in the FEIS. Baer Field, Rickenbacker Airport, and the general category

of "Other Locations" were considered as possible alternatives sites for Burlington's permanent hub. The reasons why these airports were eliminated from further consideration are explained in Chapter 2 of the FEIS and in the Alternatives section of this Record of Decision.

The FAA believes that the FEIS considered the full range of reasonable, practical alternatives. The factors limiting the scope of alternatives in this context are discussed in detail on pages 2-1 and 2-2 of the FEIS, and are summarized here. Briefly, where, as here, the federal government acts, not as a proprietor, but to approve and support a project being sponsored by a local government, the federal government's consideration of alternative sites may accord substantial weight to the preferences of the sponsor. An additional factor bearing upon the scope of alternatives is the lack of statutory authority on the part of the federal government to control or direct either which civilian airports should be developed or which cities airline carriers should serve. The federal government presently has no authority to control or direct development by local owners of civilian airports. Under the Airline Deregulation Act of 1978, the Federal Government may not regulate routes or services of air carriers or air cargo operators. Airline management may determine which cities to serve based on market forces.

In accordance with its limited role in the circumstances, the FAA has evaluated alternatives giving substantial weight to Burlington's preference to establish a permanent air cargo hub in the Toledo area and the Toledo-Lucas County Port Authority's desire to accommodate such a facility. The FAA has verified the need for the proposed project insofar as Burlington has only been temporarily stationed at Ft. Wayne and indicated that it must relocate from its temporary hub.

The FAA has reviewed the site selection process begun by Burlington in 1987, which is described in a letter on page E-63 of the FEIS. FAA's review of this process leads the agency to conclude that, based on legitimate business interests, Burlington selected the Toledo area and rejected other feasible airport locations in the Midwest whose sponsors expressed an interest.

Commentors on the FEIS also suggested that the FEIS must be revised or supplemented to reconsider the viability of Ft. Wayne, Indiana. These commentors relied chiefly on an alleged reopening of negotiations between Burlington and Ft. Wayne reported in a newspaper article dated May 12, 1990. They also challenged the statements in the FEIS that Burlington must move and has no second standby choice.

In response to the concerns expressed by these commentor, the FAA asked Burlington to clarify its position. By letter dated June 27, 1990, David L. Marshall, Chief Executive Officer of Burlington Air Express, confirmed, "...for the record that Burlington does not have any existing viable alternative to the proposed new hub project at Toledo....Burlington's recent discussions with Fort Wayne have related to temporary extension of our existing hub agreement pending completion of the delayed Toledo project. Throughout these difficulties with Fort Wayne, Burlington maintained very openly its continued commitment to its permanent hub facility in Toledo." Base on this reconfirmation of the findings in the FEIS, the FEIS need not be revised or supplemented to consider Fort Wayne as a reasonable alternative.

SUFFICIENCY OF THE NOISE ANALYSIS (NOISE IMPACTS OUTSIDE 65 LDN)

Although some segments of the Toledo community have substantially supported this project, certain portions of the community objects to the project because it will introduce new nighttime noise impacts into a rural area. U.S. EPA and other commentors posited that the noise analysis in the DEIS was deficient because it failed to fully disclose noise impacts outside the 65 Ldn contour, such as single event noise levels. In a May 4, 1990 letter, the U.S. EPA specifically commented that the discussion of the effects of noise in the EIS needed clarification. The U.S. EPA asserted that the proposed nighttime cargo operations would cause significant adverse noise impacts for individuals living in residences outside the 65 Ldn contour. Alternatively, U.S. EPA maintained that the EIS was deficient because, even if noise impacts below 65 Ldn are not considered to be significant in comparison to those above 65 Ldn, they are an important impact on a rural environment deserving full disclosure in the EIS.

In response to U.S. EPA's concerns, the FAA included a supplemental grid analysis of areas outside the 65 Ldn contour, as low as 51.6 Ldn, in Appendix G of the FEIS. The FEIS selected points bracketing the airport, both inside and outside the 65 Ldn contour, for which both Ldn and single event noise limit data was provided. In addition, subsequent to discussions between the FAA and the U.S. EPA regarding the need for additional noise analysis in the FEIS, T-LCPA made a commitment to expand the scope of its ongoing Part 150 Study to include the 60 Ldn noise contour.

Following its review of the FEIS, U.S. EPA in a letter dated June 14, 1990 determined that its concerns about full disclosure of noise impacts had been resolved both by the

supplement grid analysis in Appendix G and by the decision of the airport sponsor to expand the scope of the Part 150 Study. The U.S. EPA withdrew its environmentally unsatisfactory rating of the EIS under Section 309 of the Clean Air Act and determined that the FEIS was environmentally satisfactory. For a more detailed discussion of the issue, see Attachment III to this Record of Decision.

In any event, reliance upon the cumulative average day night sound level methodology to assess noise impacts (Ldn) and selection of the 65 Ldn contour as the threshold of significance in the noise analysis of the Toledo EIS (with supplementation as needed on a case by case basis) conforms with FAA's environmental guidelines implementing the National Environmental Policy Act (NEPA) - FAA Orders 1050.ID and 5050.4A. The FAA's environmental guidelines have been approved by the Council of Environmental Quality. Selection of the 65 Ldn contour as the threshold of significance for noise is supported by the land use compatibility guidelines published in 1980 by a Federal Interagency Committee comprised of the U.S. Department of Housing and Urban Development, and the Veteran's Administration (Guidelines for Considering Noise In Land Use Planning and Control, Federal Interagency Committee on Urban Noise, June 1980). These guidelines state that noise impacts at the 60-65 Ldn level are moderate and are normally compatible with most residential land uses. These guidelines are still in use and have not been replaced by new guidelines. No EIS prepared using the 65 Ldn contour has been found deficient on that basis.

The FAA's environmental guidelines are also consistent with the noise methodology (Ldn) and compatible land use guidelines established by the FAA in 14 C.F.R. Part 150,

pursuant to the Aviation Safety and Abatement Act of 1979. (In Part 150 the FAA established the Ldn as the single system for measuring aircraft noise and identified 65 Ldn as the normal level for compatible land use, in harmony with the interagency guidelines).

MITIGATION COMMITMENTS

Several commentors have required significant additional mitigation commitments by the project sponsor. Also, U.S. EPA in it's letter of May 4, 1990, criticized the DEIS for failure to include the full range of available mitigation options, including those which the EPA believed would effectively address noise impacts outside of the 65 Ldn contour, such as flight tracks and noise abatement profiles. EPA stated that the FAA should set a reasonable timetable for the completion of all mitigation, and that all mitigation should be completed prior to the initial operation of the project. These comments were voiced by others as well.

The FAA believes that the FEIS includes all practicable measures to avoid or minimize environmental harm from the preferred alternative. The noise mitigation program does not extend out beyond the 65 Ldn contour because Federal land use guidelines, described under the preceding issue in this Record of Decision, classify areas outside a 65 Ldn contour as compatible with the noise level.

The time and expense involved in implementing the noise mitigation program preclude its accomplishment prior to the initial operation of the project. Projected timetables for various mitigation accomplishments are provided in the Record of Decision within certain tolerance of predictability. The FAA will monitor and enforce mitigation commitments

through contractual commitments in airport grant agreements.

The FAA entered into further discussions on these issues with the U.S. EPA subsequent to its May 4, 1990 letter. Based on these discussions, the additional noise analysis reviewed by U.S. EPA in the FEIS, and the airport sponsor's commitment to broaden its Part 150 Study to include the 60 Ldn contour, the EPA eliminated the above expressed concerns from its June 14, 1990 comments on the FEIS. Additional detailed consideration of mitigation issues is included in Attachment III to this Record of Decision.

THOROUGHNESS AND DEPTH OF THE AIR QUALITY ANALYSIS

The thoroughness and depth of the air quality analysis has been questioned by local commentors. It was suggested that an analysis of air pollution concentration exposures should be accomplished by convective, dispersive mass transport modeling, and should give particular attention to the ground elevation concentrations that will exist in the critical environmental habitats that exist on and around the airport. FAA believes that this issue regarding air quality modeling has been adequately addressed on pages 4-40 to 4-44 and C-30 of the FEIS. It should be pointed out that applicable State of Ohio air quality standards developed as part of the State Implementation Plan will not be violated by the proposed project. These State standards were instituted by Ohio to conform with the National Ambient Air Quality Standards (NAAQS) which were established to protect the public health and welfare with an adequate margin of safety. FAA believes the analyses in the FEIS on pages 4-39 to 4-45 and C-30 to C-37 is adequate for the FEIS. The increased emissions are below established thresholds of significance in

FAA Order 5050.4A, Environmental Handbook, and are not expected to have any significant adverse effect on people, plants and animals near the airport.

ADEQUACY OF WETLANDS DELINEATION, ALTERNATIVES AND MITIGATION.

The issues raised by the U.S. EPA letter dated June 14, 1990, the U.S. Army Corps of Engineers (COE) letter dated June 14, 1990, and other commentors about the adequacy of the wetlands delineation and conceptual mitigation plan in the FEIS have largely been resolved, at least to the satisfaction of the federal agencies, as a result of an additional survey on June 18, 1990, and detailed review by the COE of underlying field data from previous surveys. The FEIS delineated approximately 27 acres of wetlands, all located in the construction area of Phase 2 of the proposed project. Surveys to identify these wetlands were conducted on March 12 through 15, 1990, April 15, 18,19, and 20, 1990. FEIS, Wetland Delineation Report and Preliminary Mitigation Plan, revised May 1990. After these surveys were completed, the FAA consulted with the COE which is the agency with expertise in this area, to make appropriate findings. Under the Clean Water Act, the COE has primary responsibility to determine the adequacy of wetlands delineation and whether permits to grade or fill wetlands are required.

A new survey was necessary after the FAA issued the FEIS because the FAA learned that an area of potential wetlands in the Phase 2 project area had not been surveyed . In addition, the COE advised FAA that it was necessary to review detailed field data for the Phase 2 project area to verify that the previous surveys had been done in accordance with the Federal Manual for Identifying and Delineating

Jurisdictional Wetlands. On June 18, 1990, an additional wetlands survey was done. On June 25, 1990, the data was submitted to the COE and reviewed, along with all other relevant field data, by representatives of the COE, FAA, airport sponsor, and consultant. Wetlands Delineation Report and Preliminary Mitigation Plan, revised June 1990, Attachment IV. The June survey identified a new wetlands impact area of approximately 6.7 acres in size in the construction area for the proposed runway extension and south parallel taxiway.

Upon review of the data submitted, the COE determined that the information supplied addressed its earlier comments and enabled it to effectively review the FEIS. The COE further noted that the wetlands boundaries appear to be delineated in accordance with the Federal Manual for Identifying and Delineating Jurisdictional Wetlands. The new survey data is included in Attachment IV of this Record of Decision as Appendix 2. Finally, the COE noted in their letter dated June 25, 1990, that any additional requirement will be specified during the review of the detailed project design plane concurrent with the evaluation of the U.S. Department of the Army permit under Section 404 of the Clean Water Act.

The FAA stated in the FEIS that phase 2 of the project will significantly impact 27 acres of wetlands on the airport and these impacts will be mitigated, FAA does not believe that the newly delineated 6.7 acres of additional impacted wetlands is a significant difference triggering the requirements of 40 CFR 1502.9. It does not significantly affect the adequacy of the FEIS analysis or the approach to mitigation.

Two other issues raised by the Federal agencies merit brief

mention. First, the U.S. EPA expressed concern in its June 14, 1990, letter about the possible need for further information about wetlands in a parcel of land south of Maumee Road and south of the proposed south taxiway. An access road is slated for construction here as part of Phase 1 of the project. The land is otherwise designated on the Airport Layout Plan for future development. The U.S. EPA notes that development plans for this area have not been discussed in the EIS, and that additional information will have to be developed on wetlands in this area, alternatives to avoid wetlands, and mitigation if future development is intended. This area was also surveyed on June 18, 1990. In consultation with the COE, the FAA has determined that a small wetlands site exists here that will not be affected by the access road. No other airport development is currently proposed in this area. The area will continue in its present use, which is farming. Any future airport development will be subject to appropriate environmental analysis at the time it is proposed.

Second, the COE in its letters of June 14, 1990, and June 28, 1990, described various detailed requirements for the wetland mitigation plan in discussing the conceptual mitigation plan in the FEIS. The COE concedes that these comments are preliminary in nature. This detailed information is required, not for the FEIS, but rather to apply for a permit under Section 404 of the Clean Water Act. As part of the permit process, a detailed mitigation plan will be developed in relation to project designs. The COE has stated, as discussed above, that the wetland delineation now appears to be proper. As part of the normal 404 preapplication process, the COE will subject the data to field verification to verify the extent of the wetlands.

Several non-governmental commentors stated their belief that the Phase 11 wetlands delineation was not sufficiently thorough. FAA believes that the FAA's response to comments in the FEIS on pages C-52 through C-54, and the Memorandum for Record from the COE, included in Appendix E of the FEIS, have satisfactorily addressed this issue. FAA forwarded the commentor's concerns to the COE. FAA defers to the expertise of jurisdictional agencies, particularly the COE, which has primary responsibility for determining the adequacy of the delineation.

RELATIONSHIP OF SPONSOR/SPONSOR'S CONSULTANT TO EIS PREPARATION

Several commentors pointed out that Council on Environmental Quality (CEQ) Regulations mandate that the DEIS and FEIS be prepared directly by the FAA or a contractor selected solely by the FAA, and allege this was not done. Page C-9 of the FEIS previously addressed this same concern. FAA maintains that CEQ Regulation 1506.5(a) permit an agency to require an applicant to submit environmental information for use by the agency in preparing an environmental impact statement, which was done in this case. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the work that is acceptable does not have to be redone.

One requirement in this regard is that submitted information has to be independently evaluated and the agency is responsible for its accuracy. FAA staff did review and evaluate the entire document and the preliminary documents leading up to the DEIS and FEIS. The FAA has included the names of the persons responsible for the independent evaluation in the list

of preparers in the FEIS in Chapter Six.

NEED FOR REVISION AND RECIRCULATION EIS

Several commentors suggested that the Final Environmental Impact Statement be revised and, as revised, recirculated or that a Supplement EIS be prepared.

The FEIS clarified and refined information provided in the DEIS. The FAA added information and analysis in the FEIS in response to comments on the DEIS. The FAA has evaluated the new and revised material and does not believe that any new or revised information is qualitatively or quantitatively significant so as to trigger the requirements of 40 CFR 1502.9 (c) of the CEQ regulations. No substantial changes have been made in the proposed action that are relevant to environmental concerns, nor have any significant new circumstances or information been added relevant to environmental concerns and bearing on the proposed action or its impacts.

Based on these factors, FAA has determined that rewriting or supplementing of this FEIS is not warranted under CEQ Regulations, and in turn, recirculation of any document is not necessary.

VIII. The Agency Findings

The FAA makes the following determinations for this project, based upon appropriate evidence set forth in the FEIS and other portions of the administrative record.

A. No feasible and prudent alternative exists. All reasonable steps have been taken to minimize such significant

adverse effects [49 U.S.C. 2208 (b)(5)].

This Record of Decision highlights the FAA's consideration of alternatives and decision making considerations, as well as the mitigation commitments. Therefore, approval of the improvements proposed would be consistent with 49 U.S.C 2208 (b.) (5). See also paragraphs G and H below.

B. The Governor of the State of Ohio has certified in writing that there is reasonable assurance that the project will be located, designed, constructed and operated so as to comply with applicable air and water quality standards. [49 U.S.C. 2208 (b)(7)(A)].

See Governor Celeste's June 22, 1990 letter to the U.S. Secretary of Transportation, attached to this record of decision as attachment II. This letter from the Governor of the State of Ohio certified that, pursuant to the requirements of the Airport and Airway Development Act of 1970 (P.L. 91-258, Title I, Section 16) there is reasonable assurance that the development proposed in the FEIS for Toledo Express Airport will be designed, constructed and operated so as to comply with applicable State standards for air and water quality. Also, letters from Ohio EPA dated March 21, 1990 (air quality) and April 12, 1990 (water quality) in Appendix E of the FEIS, gave reasonable assurance that the project will comply with applicable air and water quality standards.

C. The project is reasonably consistent with existing plans of public agencies for development of the area surrounding the airport. Also, it has been determined what, if any, proposed project impacts and conflicts there will be with statewide or area wide comprehensive planning, and upon the

plan of local governments [49 U.S.C. 2208 (b)(1)(A) and Executive Order 12372, Intergovernmental Review of Federal Programs, respectively].

OHIO STATE CLEARINGHOUSE

The FEIS received clearance from the Ohio State Clearinghouse on June 18, 1990. Several concerns, that were expressed by three state agencies as a result of this clearinghouse review, were to be responded to directly. First, the Ohio Department of Agriculture expressed its concern regarding the impact of the proposed project on properties with designated agricultural districts. The Department was provided information that only one property, that through which the access road was to go, was affected. The T-LCPA indicated to the Department of Agriculture that except for the access road, the entire property would remain in agricultural use.

Next, Ohio EPA expressed several concerns about the wetland delineation and mitigation included in the FEIS. The agency's comments indicated what additional data would need to be submitted at the time of application for a 404 permit and indicated that they should be added to the list of agencies for coordination in this regard, especially monitoring reports. The agency also commented on the use of monetary contributions for off-site mitigation of wetlands impacts. In this regard, the agency pointed out that a number of other options must be explored and exhausted before monetary contributions would be acceptable.

Finally, the Ohio Department of Natural Resources noted the excellent cooperation that they had with T-LCPA to protect State endangered rare and endangered species. Examples

given include realignment of the south taxiway and making arrangements to move those to be impacted by the north taxiway. Several recommendations with respect to soil erosion mitigation were given, i.e. only mulching final grades on bare sand or seeding with native vegetation to prevent the introduction of aggressive non-native grasses. The Department of Natural Resources indicated that some on-site mitigation for wetlands would be desirable to maintain water quality and preserve the ecology of the area. However, they felt that a monetary contribution to a wetland project was not acceptable.

TOLEDO METROPOLITAN AREA COUNCIL OF GOVERNMENTS (TMACOG)

In a letter dated April 4, 1989, found on page B-70 in Appendix B of the FEIS, the Toledo Metropolitan Area Council of Governments (TMACOG) stated that staff found that, "...this project isn't in conflict with areawide goals or policies." The letter also stated that the Toledo Express Airport area is identified as an "Open Space Holding Area" in the Toledo Metropolitan Area Open Space Plan for 1990, published in April 1971 for TMACOG and the Toledo-Lucas County Plan Commission. The classification of Open Space Holding (Reserve) for the area, states that the land can be used for airports and their activity.

SWANTON TOWNSHIP

Swanton Township, one of the townships in which the airport is located, has not provided any comments either positive or negative with regard to the proposed project. However, it is known that Swanton Township has zoned 400 acres southwest of the airport for residential purposes. In addition,

Swanton Township has a lawsuit underway against the Toledo-Lucas County Port Authority (T-LCPA) regarding whether the Port Authority's development activities are subject to township zoning. A State law was used by T-LCPA to declare zoning permits not required for the construction of the air cargo hub at Toledo Express Airport since the airport is defined as a public utility. This was challenged in court by Swanton Township in the Fall of 1989, and the court upheld the public utility classification of the airport property. Trustees for Swanton Township have decided to appeal to the State Supreme Court a decision by the Sixth District Court of Appeals upholding a lower courts ruling that the airport is a public utility and not subject to a zoning permit.

MONCLOVA TOWNSHIP

Monclova Township, the other township in which most of the airport is located, has not provided any comments either positive or negative with regard to the proposed project's consistency with local land use for Monclova Township.

SPRINGFIELD TOWNSHIP

Springfield Township, in which a very small portion of the airport is located, has not provided any official comments either positive or negative with regard to the proposed project. A township zoning commissioner expressed his concerns and opposition to the proposed project but wasn't specific as to the proposed development's consistency with local land use plans for Springfield Township.

LUCAS COUNTY

Lucas County has been supportive of the proposed project, and has cooperated with the T-LCPA in the areas of drainage, water supply and wastewater treatment planning efforts, including funding assistance. These are detailed in a letter on page on D-42 in Appendix D of the FEIS. The County has also indicated that it would work with T-LCPA to create a Community Reinvestment Area around the airport. The letter pointed out that the County believes that the airport development is compatible with the industrial park the County is developing northeast of the airport.

VILLAGE OF SWANTON.

The Administrator of the Village of Swanton submitted the village's strong opposition to the establishment of a national air cargo hub at Toledo Express Airport and gave a variety of reasons for this opposition. First, the Village found the estimate of noise and resultant disruption of the nighttime environment within the Village to be unacceptable and indicated its belief that the proposed operation of such a hub will eliminate residential growth for the Village. FAA notes this concern but believes that while there will be some impact on the area encompassed by the Village, for the most part the existing and proposed land uses within and in nearby adjacent areas to the Village are compatible with the noise expected to be produced at the airport (see pages 4-7 through 4-36 of the FEIS). As to the Village's other concern, the effect of air pollution on the Village reservoir and water supply, FAA believes that this was adequately responded to on page C-31 of the FEIS, in the Appendix C. Comment Responses.

VILLAGE OF WHITEHOUSE

The Mayor of the Village of Whitehouse expressed the belief that residents of the community should not be subject to decisions made by a governmental body where they cannot be represented. Residents of the village who will be affected by Toledo Express Airport's proposed changes can't vote within the city of Toledo's jurisdiction and therefore were not represented in the governmental decision to make changes. No comments were made as to the proposed project's consistency with local land use plans.

D. Fair consideration has been given to the interests of communities in or near the project location [49 U.S.C. 2208 (b)(4)].

Nearby communities have had the following opportunities to express their views:

Scoping meeting, held on May 2, 1989.

The public hearing on February 6, 1990 on the Draft Environmental Impact Statement. The hearing record remained open for additional written comments until February 27, 1990, which included a one week extension.

The DEIS public comment period of January 5, 1990 through February 27, 1990, which included a one week extension.

The FEIS comment period of May 18, 1990 through June 18, 1990 during the hold period before signing the Record of Decision.

Two communities sent formal comments on the FEIS, the

Village of Swanton and Village of Whitehouse. Finally, after the comments were thoroughly reviewed, responses were prepared. These responses can be found in Appendix C the FEIS and in Attachment III to this Record of Decision. No other written comments were received from the affected jurisdictions.

E. Appropriate action has been or will be taken to restrict to the extent reasonable, the use of land un the vicinity of the airport to purposes compatible with airport operations [49 U.S.C. 2210 (a)(5)].

The Airport Sponsor, Toledo-Lucas County Port Authority (T-LCPA), is required in every grant application to furnish a statement on compatible land use. Each grant the T-LCPA receives contains an assurance on compatible land use. The T-LCPA and the City of Toledo, the operator and owner of the airport, respectively, do not have land use control outside of the airport's boundaries. The T-LCPA will, therefore, effect compatible land uses directly, through a combination land acquisition and sound attenuation/easement program, delineated under noise mitigation and will use its best efforts to encourage surrounding jurisdictions to take appropriate actions.

The T-LCPA has advised local jurisdictions of its current and future planned development. It is undertaking a FAR Part 150 Noise Compatibility Planning Study which involves the local jurisdictions. Part of that study's recommendations are expected to include adoption of additional land use controls by the surrounding communities to control future non-compatible development.

F. For this project, which will involve the displacement and

relocation of people, fair and reasonable relocation payments and assistance have been or will be provided pursuant to the provisions in Title II of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, as amended. Comparable decent, safe, and sanitary dwellings are available for occupancy on the open market or will be built if necessary prior to actual displacement [42 U.S.C. 4801].

Evidence to support this determination is summarized on FEIS pages 4-32 through 4-39.

G. For this project, involving new construction which will affect wetlands, there is no practicable alternative to such construction. The proposed action includes all practicable measures to minimize harm to wetlands which may result from such use [Executive Order 11990, as amended].

Evidence to support this determination is in the FEIS on pages 4-59 through 4-66, and the Record of Decision and its attachments.

H. For this project, involving new construction which will affect floodplains, there is no practicable alternative to such construction. The proposed action includes all practicable measures to minimize impact to floodplains which may result from such use [Executive Order 11988, Floodplain Management, 43 CFR 6030 and DOT Order 5650.2, April 23, 1979, Floodplain Management and Protection].

Evidence to support this determination is in the FEIS on page 4-67, and the Record of Decision and its attachments.

I. For this project that requires constructive use of a

campground in Oak Openings Metropark Preserve, there is no feasible and prudent alternative, and the project include all possible measures to minimized harm to the campground resulting from the use [Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303].

The project will cause significant night time noise impacts, noise levels of 70 Ldn, on a campground located within Oak Openings Metropark Preserve. The Department of the Interior concurs with the FAA's Section 4(f) determination and with the relocation of this campground within the park, outside of the 65 Ldn area, to minimize the harm. The evidence to support this finding is located on pages 4-40 through 4-52 of the FEIS.

J. The FAA has given this proposal the independent and objective evaluation required by the Council on Environmental Quality [40 CFR 1506.5].

As described in the FEIS, there was a lengthy process that led T-LCPA ultimately to identify a preferred runway and taxiway configuration for this facility. If the FAA had not made available its expertise and guidance on the numerous technical matters that arose during these formulative stages, it is possible that T-LCPA might have undertaken a project that was seriously deficient from a safety or an airspace efficiency perspective. Because the FAA best possesses the ability to make such determinations, it was entirely appropriate for officials in the FAA to provide the technical review that occurred. Based upon examination of the record, it is concluded that such assistance neither compromised the objectivity of the FEIS, nor hampered the FAA's ability to insure that environmental considerations were accorded a full measure of consideration.

Similarly, it is satisfied that the FAA has conducted a sufficiently independent review of the factual assumptions relied upon by T-LCPA and its consultants. Committed career individuals at FAA have devoted hundreds of hours to insuring compliance with the National Environmental Policy Act, and other environmental requirements. The agency's responses to the public comments in the EIS process are detailed and comprehensive. That document also describes the great care and attention which was paid by FAA to pressing concerns, such as alternatives, DOT Section 4(f) land determination, air quality, wetlands, water quality and noise. Accordingly, it is found that the independent and objective evaluation called by the Council on Environmental Quality has been provided.

IX. DECISIONS AND ORDERS

Since the airport sponsor's proposed project has been determined to be the FAA's preferred alternative in the FEIS approved on May 11, 1990, and in this Record, the two remaining decision choices available for the FAA are to approve the agency actions necessary for the project's implementation, or to not approve them. Approval would signify that the applicable federal requirements relating to airport development planning have been met, and would permit T-LCPA to proceed with the proposed development using the Authority's own money and receive federal funds for other eligible items of development. Not approving these agency actions would prevent T-LCPA from proceeding with locally supported, as well as Federally supported development, in a timely manner.

The FAA's goals and objectives have been carefully considered in relation to the various aspects of the Toledo Express

Airport discussed in the FEIS, including the purposes and needs to be served by this project, the alternative means of achieving them, the environmental impacts of these alternatives and the mitigation necessary to preserve and enhance the environment.

Under the authority delegated to me by the Administrator of FAA, it is found that the project is reasonably supported, and it is therefore directed that action be taken to carry out the agency actions discussed more fully in Section II of this Record, including those listed below:

A. Approval of an Airport Layout Plan submitted by Toledo-Lucas County Port Authority for Toledo Express Airport depicting the Phase 1 and Phase 2 development.

B. Approval to proceed with the processing for Federal funding for those eligible projects described within the FEIS, where such funding is requested by the sponsor under the Airport and Airway Improvement Act of 1982, as amended.

C. Development of air traffic control and airspace management procedures designed to effect the safe and efficient movement of air traffic, within the contours set forth within the FEIS, to and from the airport as described on the Airport Layout Plan, approved herein. In conjunction with future CAT II ILS, if the air cargo operations will require CAT II ILS capability, the air cargo aircraft operators must obtain authorization through changes in operations specification through the applicable FAA Principal Operations Inspector.

D. Installation, on airport, of navigation aids depicted on the Airport Layout Plan and, where appropriate, the relocation and operation of navigational aids associated with the

extended runway and (as addressed in the FEIS and Attachment I of this Record of Decision).

APPROVED: /s/ Jul 12 1990
W. Robert Billingsley Date
Acting Manager, Airports Division,
Great Lakes Region
(Approving Official, Final Environmental
Impact Statement)

APPROVED: /s/ Jul 12 1990
Edward J. Phillips Date
Regional Administrator, Great Lakes Region
Federal Aviation Administration

The decision is taken pursuant to 49 U.S.C. 1301 et. seq and 49 U.S.C. 2201 et. seq., and constitute an order of the Administrator which is subject to review by the courts of appeals of the United States in accordance with the provisions of Section 1006 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1486.

APPENDIX D

RECORD OF DECISION

ATTACHMENT III

COMMENTS AND RESPONSES ON THE FINAL ENVIRONMENTAL IMPACT STATEMENT (FEIS) FOR TOLEDO EXPRESS AIRPORT

[Excerpts]

* * *

DETAILED RESPONSE TO COMMENTS

PURPOSE AND NEED

(Commentors - William Reuter letter dated May 25, 1990, and Official Position Paper, Thomas Frank letter Nos. 1, 17, 22 dated May 15, 1990, Aaron Jennings Comment Nos. 15, 16)

FAA believes that Chapter One of the FEIS entitled, Purpose and Need, and the Response to Comments on the Draft EIS found on pages C-11 through C-13 of the Final EIS are adequate. The Record of Decision will include some clarification for the FAA Decision Maker based on the concerns discussed below.

Lack of Appropriate Statistical Information

Several commentors indicated that Chapter One, Purpose and Need, was flawed because FAA Order 5050.4A requires

valid statistical information be presented to support the need for an action, and this was not included in this chapter. However, such data does not need to be included in the Purpose and Need portion of the FEIS, but may be appended. The statistical information requested is found in the forecasts on page 3-3 of the FEIS, which reflect the recent business decision by Burlington Air Express (BAX), in conjunction with the Toledo-Lucas County Port Authority, to establish a national air cargo hub at Toledo Express Airport. No further statistical data is necessary.

The commentors also indicated their belief that the purpose of and need for the proposed project is not only to facilitate development of air cargo capability and airport development, but to provide Burlington Air Express with a more cost-effective location than they could secure at any other airport they examined. FAA agrees that was likely the basis for the business decisions by BAX and T-LCPA to construct facilities at Toledo.

The commentors also point out that the FAA goals to facilitate air cargo development and airport improvement can be accomplished just as well at Fort Wayne or at Rickenbacker. The commentors argue that development of facilities to support air cargo operations at Fort Wayne and Rickenbacker would cost less in federal funds for development, and would have less adverse environmental impact, but were not examined in detail in the FEIS because they are unattractive to Burlington Air Express from an operating cost standpoint. Chapter Two of the FEIS and the Record of Decision discuss why these alternatives were not pursued.

The commentors go on to argue that in effect, the government, the public and the environment pay more so Burlington

can pay less. The FEIS did not hide relevant facts. One of the key advantages of Toledo Express Airport for Burlington was the financial and airport development package put together by the T-LCPA. The Toledo airport development will cost money, and several environmental impacts will be significant. Toledo will also reap some economic benefits from the project.

Purpose and Need for the Project Versus Purpose and Need for the Federal Action

The FAA clarified the need for the project and the need for Federal actions in the FEIS. Demand for the project is based on the business decision by Burlington Air Express and the willingness of Toledo-Lucas County Port Authority to accommodate this decision. With or without federal funding, the project could be undertaken, but other Federal actions are still necessary.

Despite several commentors allegations that the T-LCPA has not explained the need and purpose of their proposed project, it has been explained throughout the document that it is to accommodate the needs of an air cargo operator who wants to utilize the airport as the base for its operations. Airports throughout the county are expanded on this basis, such as exist between Burlington and the T-LCPA. Many are expanded on the basis of forecasts (statistical information) without commitments. There does not have to be any further justification for the purpose and the need.

One commentor noted that a comment on 4-39 of Chapter Four of the FEIS regarding the proposed project serving the growing demand for air cargo facilities in the Toledo region remains the same even though it was changed in Chapter One

of the FEIS. This was due to an editorial omission.

Why Purpose and Need Changed from the DEIS to the FEIS

The previous explanation of purpose and need in the DEIS was not fictitious or fraudulent but needed further explanation based on the misconceptions voiced by several commentors. Clarifications has been provided in the FEIS.

Role of FAA in Funding the Relocation of a Singular Private Airline Company

FAA has made no previous commitments to funding this development program and has no role in offering financial enticements to Burlington move to Toledo. Airport facilities for the exclusive use of Burlington are not eligible for federal funding. The FAA does expect the T-LCPA to apply for Federal aid for development items which are eligible, particularly with respect to environmental mitigation costs. The FAA does not currently know how much Federal aid may be made available to the T-LCPA in subsequent years. This will depend in part on how well the project competes in priority with other projects requesting discretionary funding in subsequent years.

FAA will not speculate as to the answers to the questions posed by the commentors as to the specifics of Burlington and T-LCPA's business decisions, particularly Burlington's relationship to Fort Wayne over the past six years and Fort Wayne's role as a "temporary" vs. a "permanent" location.

Whether BAX must leave Fort Wayne was also challenged by the commentor. FAA has verified this to the extent that it is the position represented by Burlington and supported by

reasonable information. The word "must" is necessarily subjective. BAX perceived that it must leave Fort Wayne to continue to operate and grow. This is a business decision. Burlington, by letter dated June 27, 1990, reconfirmed its commitment to the establishment of a permanent hub at Toledo and that Burlington does not have an existing viable alternative to the preferred alternative.

Burlington's recent discussions with Fort Wayne have related to a temporary extension of their existing hub agreement pending completion of the delayed Toledo project. Throughout these discussions Burlington has maintained very openly its continued commitment to a permanent hub facility in Toledo. Although there are a number of very good reasons for Burlington's need to relocate to Toledo, the one major reason is that the Fort-Wayne Allen County Airport Authority simply has not been able to develop sources of financial support for the extensive airport improvements required by Burlington. Despite the continuing goodwill of the Fort Wayne Airport management, funding for these improvements has not been achievable in Fort Wayne.

Benefits and Costs of Proposed Action

This information was not presented as a cost benefit analysis. The economic benefits expected by Toledo are a driving force for their pursuit of this project, and contribute to an understanding of the preferred alternative versus the no action alternative. The information was used in the FEIS to describe anticipated socio-economic impacts of the proposal.

The word "permanent" is an appropriate description of the jobs associated with the sorting facility, as there will be numerous other temporary jobs that will be created during

the five year period when various types of construction activities will be completed. In the local decision making it appears that the permanent jobs were one of the items considered in deciding to accommodate Burlington. There is no need to revise the FEIS in this regard.

ALTERNATIVES

(Commentors - William Reuter letter dated May 25, 1990, and Official Position Paper, Thomas Frank letter Nos. 2, 3, 18 dated May 15, 1990, and letters dated June 14, 1990, June 15, 1990, and June 16, 1990, Aaron Jennings comment Nos. 9, 15, 16)

FAA believes that the facts were satisfactorily portrayed in the FEIS Alternatives Analysis. The negative aspects of the project were also made clear in the FEIS. The Preferred Alternative would have significant environmental impacts which are evaluated in detail in Chapter Four of the FEIS. The significant impacts would be noise, land use, social impacts, water quality, Section 4(f), endangered and threatened species of flora and fauna (State listed only), wetlands, floodplains and construction impacts. These impacts are considered to be significant because they exceed the threshold of significance established in FAA Order 5050.4A. The Record of Decision will incorporate portions of the following concerns by the commentors so that the FAA decision maker is aware of the most significant negative aspects of the project at the time the alternatives are discussed. These concerns are listed with FAA's evaluation of their validity.

One commentor indicated that the FEIS alternative analysis should be revised to inform the FAA decision maker that the positive economic benefits to the Toledo Area are offset in

part by possible economic disadvantages in the form of depressed residential property values in the vicinity of the airport, significant adverse environmental impacts (e.g. substantially increased air pollution, loss of wildlife habitat, and the need for replacement of wetlands for Phase 2 of the project). The commentor also advises that the FEIS should be revised to identify development and mitigation costs and state that the $40 million needed for Phase 2 improvements, noise mitigation, and wetlands replacement may be funded largely through public sources. Lastly, the commentor states that the FAA decision maker should be told that Toledo was selected as the preferred alternative because of its cost advantages for Burlington, even though the adverse environmental impacts may be less in these other locations.

In response to these requests for changes in the alternatives analysis of the FEIS, FAA notes that noise is only one of a number of factors which may affect property values in an airport's vicinity. There continue to be high-priced, as well as low-priced, residential developments around airports. The extensive noise mitigation program (i.e., acquisition/relocation, sound attenuation, and easements) will serve to counteract negative impacts. In regard to the adverse impacts, FAA agrees that there will be some significant adverse environmental consequences. However, FAA doesn't agree that the air pollution impact will be significant, based on the FEIS analysis and the lack of air quality concerns by U.S. EPA and Ohio EPA.

The identification of the cost of the project and associated mitigation has also been identified by commentors as an issue. Some of the estimated costs of the project have been provided in several locations in the FEIS, i.e., noise mitigation measures at a total of $30,700,000.00. Other costs have

been developed recently, i.e. $1,765,000.00 has been estimated for wetland mitigation. The current estimate for the total cost of the proposed project with mitigation is $90,150,000.00. FAA has made no attempt to hide the fact that the proposed project will be funded largely by public sources, either local or Federal. However, most of this funding will be come directly from user fees/lease agreements and the sale of land not needed for airport purposes after it has been made compatible, or be reimbursed at a later date from such sources, after borrowing money for front and costs. FAA's reasons for supporting the preferred alternative are clearly described in the FEIS and the Record of Decision. The financial advantages to Burlington are important reasons driving this proposal.

One commentor advises that the analysis of the No Action Alternative in the FEIS is biased and incomplete because:

1. The review fails to note that the analysis of economic benefits will be Ft. Wayne's gain.

2. The summary does not list all of the adverse impacts that will occur with no action, which are:

no night noise for residents within 5 miles of the airport

no probable decline in property values

no need for public funding of facilities needed exclusively for Burlington

no need to relocate two nursing homes, soundproof homes, and relocate Oak Openings camp

no increase to three times present air pollution

no loss of habitat for state endangered species

3. The summary fails to state that all of the above will be avoided in exchange for a "slightly" less advantageous location for Burlington in Ft. Wayne.

The commentor asks that the FEIS be revised to clarify the above for the FAA decision maker and for CEQ, should it become involved.

FAA believes that the discussion of alternatives and comparison of adverse environmental impacts of the reasonable alternatives in the FEIS meets the requirements of NEPA, 40 C.F.R. 1502.14, and 40 C.F.R. 1502.23. As explained in the FEIS, the FAA verified that Burlington selected the Toledo location for its permanent hub and rejected Baer Field, Ft. Wayne, its present location, based on legitimate business reasons. The FEIS properly eliminated Baer Field, Ft. Wayne as a reasonable alternative and did not contrast the environmental impacts of continued operations by Burlington at that location with those of the proposed action. In response to other comments on the FEIS questioning Burlington's current commitment, Burlington recently confirmed to FAA that it remains committed to the establishment of a hub at Toledo. See letter from David L. Marshall, Burlington to Peter Serini, FAA, Manager Airports District Office dated June 27, 1990. For these reasons, revision of the FEIS as suggested is unnecessary.

<u>No Mention of Availability of a Second Choice for Burlington</u>

Commentor advisers that the statements on page 2-16 of the FEIS about the absence of a second standby choice to Toledo for Burlington are incorrect. He claims that the FAA is well aware that Ft. Wayne is very desirous of keeping Burlington, that substantial improvements at Ft. Wayne make it very attractive, and that, according to an article in the Ft. Wayne Journal Gazette dated 5/12/90, Burlington is actively discussing Ft. Wayne as an alternative to Toledo. He also advises that the FEIS should be revised to state that Ft. Wayne may be a viable alternative, it would be less costly to the federal and local governments, and that there are no known incremental environmental impacts associated with continuation of operations at Ft. Wayne.

As explained previously, Burlington, by letter dated June 27, 1990, reconfirmed its commitment to the establishment of a permanent hub and that Burlington does not have an existing viable alternative to the proposed action. Based on this reconfirmation, the FAA does not believe there is a need to review the FEIS.

Burlington's recent discussions with Fort Wayne have related to a temporary extension of their existing hub agreement pending completion of the delayed Toledo project. Throughout these discussions Burlington has maintained very openly its continued commitment to a permanent hub facility in Toledo. Although there are a number of very good reasons for Burlington's need to relocate to Toledo, the Fort-Wayne Allen County Airport Authority simply has not been able to develop sources of financial support for the extensive airport improvements required with their project. Despite the continuing goodwill of the Fort Wayne Airport Management, funding for these improvements has not been achievable in Fort Wayne.

Based on this reaffirmation of position by Burlington Air Express, FAA sees no basis for an evaluation of Fort Wayne as viable alternative to the proposed action and stands by its evaluation of alternatives provided in Chapter Two of the FEIS.

Commentor believes that Baer Field-Ft. Wayne is the preferable alternative environmentally because of past environmental findings at this airport.

The FAA considers the No Action Alternative to be the environmentally preferable alternative, as discussed in the Record of Decision. The FEIS and the Record of Decision indicate that, in the short term, the No Action Alternative would result in Burlington's continuing to operate at Fort Wayne.

FAA Not Carrying Out NEPA Responsibilities With Respect to Alternatives

A commentor advises that the FEIS seems to make conflicting statements. The commentor believes a Federal agency which affords substantial weight to the site preferred by an airport sponsor and air cargo operator for the establishment of a new hub has not fulfilled even a limited role in evaluating alternatives as required under NEPA. Commentor states that the FAA should have played a more significant role by examining Rickenbacker Airport and Baer Field in Ft. Wayne more closely, using more recent data than the London and Egazarian study commissioned by Burlington, interviewing the airport operators, and taking sworn statements from Burlington, officials. He argues that the London and Egazarian study should not have been considered because it is outdated and unsubstantiated.

He similarly asserts that the doctrine of federalism is irrelevant. He posits that the FAA's role is not limited or restricted.

FAA believes that in fulfilling its responsibility under NEPA to evaluate reasonable alternatives in EISs for proposed federal actions, it must consider all factors bearing upon the reasonableness of alternatives. The inability of any Federal agency to control airline routes and services under the Airline Deregulation Act is one factor bearing upon the scope of reasonable alternatives. Whether the proposed project involves a permit or an application, or proprietary actions by an agency with direct control, is another factor which affects the scope of reasonable alternatives appropriate for consideration in an EIS. The FAA properly eliminated Rickenbacker and Baer Field from further consideration based on reasons documented in the FEIS. Burlington officials have been requested at various points in the environmental review processes to provide statements to the FAA.

The London and Egazarian study of alternative sites, which ultimately recommended Toledo over Ft. Wayne, was not included in the FEIS. However, the summary of that report that was provided to the FAA is included in the FEIS. However, the summary of that report that was provided to the FAA is included in the FEIS appendix. That summary was sufficient to enable the commentor to prepare five pages discussing the site selection criteria.

In any event, as explained previously, Burlington recently reconfirmed its commitment to the Toledo site. The commentor has presented no evidence showing that Baer Field, or Rickenbacker, for that matter, are viable, reasonable alternatives.

* * *

NOISE MITIGATION

(Commentors - Thomas Frank letter Nos. 8, 9, 10, 11, 13, 14, 15, and 19 dated May 15, 1990, and May 21, 1990, and letters dated June 14, 1990 and June 16, 1990, Aaron Jennings comment Nos. 10, 11, 13, 14, 16)

Timetable

Commentors wish to know if noise mitigation will be substantially complete before the Burlington commences aircraft operations at Toledo Express Airport.

The sponsor has agreed to make best efforts to relocate individuals residing in noise impacted areas within the 75 Ldn noise contour and those properties in close proximity to the 75 Ldn line within three years and to relocate the nursing home residents by the start of operations. Furthermore, the airport sponsor has committed to complete the Part 150 expeditiously and to accomplish all mitigation required for the project, with or without federal funds. The FAA will assure accomplishment of mitigation required for the project by imposing it as a condition in the sponsor's grant conditions.

Commentor requests that six conditions be attached to the ROD. These are:

1. Completion of the Part 150 Study for inclusion in the FEIS before construction begins,

2. a specific plan to relocate nursing homes within a

reasonable time frame,

3. substantial completion of residence relocation and noise attenuation before operations begin, e.g. specific set of requirements for substantial progress to implement these measures before operations begin,

4. verify availability of funds for noise and wetland mitigation,

5. proof that the scout camp can be relocated to a suitable area within Oak Openings Camp, and

6. enforceable restrictions on adverse changes in noise profiles due to Burlington's growth during 1991-2000.

The commentor believes that Section 509(b)(5) of the Airport and Airport and Airway Improvement Act may require completion of the Part 150 Study. The FAA disagrees. To the extent that statute imposes a substantive mitigation requirement, the mitigation commitments described in the FEIS suffice to satisfy the requirement.

The Part 150 study is expected to fine-tune the implementation of these mitigation commitments, as indicated in the FEIS; but the commitments themselves are firm, irrespective of the Part 150 study. The FAA's NEPA guidelines do not require that Part 150 studies be completed in conjunction with EISs. The airport sponsor has committed to complete the Part 150 Study as expeditiously as possible.

The airport sponsor has established a reasonable time frame for the relocation of the nursing home residents. It has agreed to commence efforts to relocate them promptly

following issuance of a favorable Record of Decision, and to make every effort to complete relocation by or shortly after January 1992, when operations are scheduled to commence. Although there are many circumstances beyond its control, the sponsor plans to relocate the residents of approximately 100 homes within 75 Ldn noise contour and in close proximity to the 75 Ldn line within a three year period. Given the time and expense normally required to acquire property and relocated residences, as well as to soundproof or acquire easements, it is not reasonable to require substantial completion of the noise mitigation commitments before operations begin.

The Record of Decision recognizes the sponsor's commitment to accomplish the mitigation required for the project, including noise mitigation, suitable relocation of the scout camp within Oak Openings park, and wetlands mitigation. FAA believes that there is a reasonable certainty that mitigation will be accomplished.

The FAA believes that extensive mitigation commitments in the FEIS and Record of Decision obviate the need for additional noise mitigation. Burlington has projected no growth in operations to the year 1995. Between 1995 and 2000, Burlington projects the transition to an all Stage 3 fleet. The introduction of quieter aircraft would overshadow projected increases in operations.

Source and Availability of Funding for Mitigation

Commentor requested information on the funding availability for the proposed action.

The T-LCPA has indicated in their letter dated March 28,

1990, included in Appendix E of the FEIS, that they will take appropriate action within their power to implement with or without federal funds the mitigation measures identified in the FEIS.

It is FAA's understanding that the T-LCPA intends to proceed with the above noise mitigation with or without federal funding.

The FAA can take no funding action consideration on any of the proposed Phase 1 or Phase 2 improvements until after this ROD.

One commentor quoted Section 509(b)(1)(B) of the Airport and Airway Improvement Act of 1982, 49 U.S.C. 2208(b)(1)(B), which provides that "no project grant application may be approved by the Secretary unless the Secretary is satisfied that sufficient funds are available for that portion of the project costs which are not paid by the United States under this title:" and related it to the TLCPA intention to seek Federal funding assistance for the cost of noise mitigation measures. He feels that the TLCPA has failed to provide any assurance that sufficient non-federal funds are available to cover the cost of noise mitigation measures.

Section 509(b)(1)(B) of the Airport and Airway Improvement Act of 1982, refers to the sponsor's share of the particular project cost for which the sponsor has applied for federal grant funds. The FAA cannot approve a grant application unless they have certification in writing from the project sponsor that they can provide their share of the project costs. In the case of the TLCPA, this would be 10% of the total project costs for each particular project application, not the entire noise mitigation project.

The TLCPA has certified in a letter dated July 5, 1990, that they can provide their local share of any federal grant requirements.

Commitment to Mitigate and Its Enforcement

Commentor was advised by Mr. Robert Dickerson of the U.S. EPA and by their counsel that they should be certain to insure that the ROD on the Toledo project should be very clear on a commitment to mitigate. He feels that the ROD should clearly state:

1. Who or what agency is responsible for the implementation of noise mitigation?

2. Where will the funding come from -- FAA or State, or Local or Sponsor?

3. What is the required time table for completion of mitigation of noise?

4. What controls will be established to monitor and enforce mitigation?

5. What guarantee will be put in place to be sure that the public is adequately protected against the possibility of slow, inadequate or incomplete noise mitigation by the project sponsor?

6. An absolute, total and legally enforceable commitment by the FAA that adequate mitigation will be accomplished and will be completed before any adverse impacts occur on the people affected by the project.

The TLCPA will be responsible for the implementation of noise mitigation.

The funding will be the sponsor's responsibility, and may include FAA, State and Local funding as available.

Timetables have been previously discussed.

The FAA cannot make a commitment that mitigation will be accomplished and completed before any adverse impacts occur on the people affected by the project. Mitigation cannot reasonably be accomplished and completed before any adverse impacts occur on the people affected by the project. Mitigation cannot reasonably be accomplished that quickly.

* * *

APPENDIX E

BURLINGTON AIR EXPRESS

David L. Marshall
CHAIRMAN
CHIEF EXECUTIVE OFFICER

May 2, 1990

Mr. James A. Koslosky
Director of Airports
Fort Wayne/Allen County Airport Authority
Baer Field
Baer Field Terminal, Room 209
Fort Wayne, Indiana 46809

Dear Jim:

I greatly appreciate your letter of April 25, though our marvelous postal service produced my copy only on May 1. The cooperative and constructive tone of your letter again typifies to me the really outstanding character of the Airport Authority, and Jim Koslosky in particular.

I have enjoyed my association with you and your colleagues to the fullest since we first started the hub extension negotiations late last year. Your letter of February 27 this year was further evidence of goodwill and I now sense, with your April 25 letter, your further support for our association, and for the mutual benefits which have accrued and are continuing.

Burlington's situation today is substantially the same as when we last met. The environmental permitting process is drawing to an end, and we should see a pickup in related

project activities as we move into the summer. Burlington remains committed to the Toledo project in exactly the same manner as you and I discussed last February, though the necessary "kick-off" time for this major event has drawn much closer. There are many risks ahead, and there continue to be major uncertainties. In this environment, I remain deeply grateful for the continuing support of the Fort Wayne/Allen County Port Authority and for your own leadership. I accept the spirit and purpose of your letter and I want to assure you that I will look to Fort Wayne for support and solutions as and if our Toledo commitment is altered by any of the risks or uncertainties that lie ahead.

I particularly value the work which you and your cooperating group have done to set the stage for a possible package of competitive, enabling terms and conditions should Burlington's situation change. I take all of that very seriously, as I know you do, and I hope you will share with your group my esteem for this farsighted preparation.

You have earned our permanent respect and I do consider that you and your associates have positioned yourselves at the peak of professionalism. As a result, I am able to bank your support and you, in turn, can bank on Burlington's responsiveness as and if we find that our circumstances in Toledo change. That scenario will unfold over the coming months, and I would hope and suggest that you and I stay closely in touch.

Best personal regards.

Yours sincerely,

/s/ David

(2)

No. 91-397

FILED

NOV 8 1991

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

CITIZENS AGAINST BURLINGTON, INC., ET AL.,
PETITIONERS

v.

JAMES B. BUSEY, IV, ADMINISTRATOR, FAA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR
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QUESTIONS PRESENTED

1. Whether an environmental impact statement prepared by the Federal Aviation Administration (FAA) on an application by the Toledo-Lucas County Port Authority to revise its airport layout plan and for funding to expand the Toledo Express airport to accommodate a major cargo hub, was deficient for failure to give detailed consideration to the alternative of having the private operator of the hub remain at its present temporary location in Fort Wayne, Indiana.

2. Whether the FAA's finding under Section 509 (b) (5) of the Airport and Airway Improvement Act, 49 U.S.C. App. 2208(b) (5), that all reasonable steps have been taken to minimize harm from noise generated by the cargo hub was arbitrary or capricious.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-397

CITIZENS AGAINST BURLINGTON, INC., ET AL.,
PETITIONERS

v.

JAMES B. BUSEY, IV, ADMINISTRATOR, FAA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-46a, is reported at 938 F.2d 190. The record of decision of the Federal Aviation Administration, Pet. App. 49a-134a, is unpublished.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47a) was entered on June 14, 1991. The petition for a writ of certiorari was filed on September 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Toledo-Lucas County Port Authority (Port Authority) operates the Toledo Express Airport. Pet. App. 49a. In 1987, an air cargo operator, Burlington Air Express, Inc. (Burlington), approached the Port Authority, seeking to establish a permanent cargo hub after having operated at a temporary facility in Fort Wayne, Indiana, since 1985. Pet. App. 50a. Burlington had examined 17 airports in four Midwestern states as potential sites for a permanent hub, but determined that Toledo was the optimum location for a hub because of the quality of its work force, the airport's prior operating record, its location near Burlington's crucial automotive markets, and the Port Authority's ability to provide financing for necessary facilities. Pet. App. 3a.

On February 2, 1989, the Port Authority submitted to the Federal Aviation Administration (FAA) proposed revisions to its Airport Layout Plan showing runway extensions, a new taxiway, a sorting facility, ramps, and other facilities needed to support a permament cargo hub. Pet. App. 3a-4a. The FAA reviews such plan revisions to see that the changes do not compromise the airport's safety, utility, or efficiency, 49 U.S.C. App. 2210(a)(15), or conflict with applicable environmental restrictions. Pet. App. 51a-52a.

Pursuant to Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. 4332(2)(C), the FAA prepared an environmental impact statement (EIS) evaluating the proposal. After holding a public hearing and considering comments on a draft EIS, the FAA issued its final EIS (FEIS) in May 1990. The FEIS contained a detailed discussion of the environmental impacts of construction and operation of the cargo hub. Pet. App. 4a-5a, 21a-24a. That aspect of the FEIS is no longer at issue.

The FEIS also considered alternatives to the proposal, as required by 42 U.S.C. 4332(2)(C)(iii). It included an in-depth analysis of the proposed action of expanding the Toledo airport and the no-action alternative. See FEIS 2-2 to 2-6, 2-13 to 2-14, 4-1 to 4-68. It also considered alternative designs and runway configurations, FEIS 2-7 to 2-10, alternative distribution of projected air traffic at Toledo, FEIS 2-10 to 2-13, and the possibility of locating the hub at other airports inside and outside of Toledo, FEIS 2-14 to 2-16.

With respect to the Fort Wayne airport, the FEIS noted that it is (a) antiquated and not designed specifically as a cargo hub, (b) farther than Toledo from Burlington's markets in Detroit, and (c) unconnected to major highways. FEIS 2-15. The FEIS also noted Burlington's difficulty in attracting skilled workers in Fort Wayne and Fort Wayne's inability to put together a competitive funding package for improvements needed to create an efficient hub. FEIS 2-15.

The FEIS and the FAA's Record of Decision (ROD) presented a detailed plan for mitigating the noise impacts of the proposal by eliminating almost all existing incompatible land uses within the most heavily affected area. Pet. App. 68a-71a; FEIS 4-32 to 4-39. Approximately 100 residences and two nursing homes will be acquired, and their residents will be relocated. Pet. App. 68a. The Port Authority will create a "relocation team" to accomplish this process with as little disruption as possible to residents. Pet. App. 72a-73a. The Port Authority has also committed to implement a sound attenuation and easement acquisition program for houses outside the acquisition zone. Pet. App. 69a. The FAA will assure that these commitments are carried out by making mitigation

a condition of grant approvals. Pet. App. 129a. In addition, a Noise Compatibility study, 14 C.F.R. Pt. 150, being carried out by the Port Authority "will provide valuable input on timing and priorities in this program." Pet. App. 69a.

2. After the FAA issued its ROD, petitioners filed a petition for review challenging the FAA's decision under Section 102(2)(C) of NEPA, 42 U.S.C. 4332 (2)(C), Section 4(f) of the Department of Transporation Act (49 U.S.C. 1653(f) (1976), recodified, 49 U.S.C. 303(c)) and Section 509(b)(5) of the Airport and Airway Improvement Act (AIAA), 49 U.S.C. App. 2208(b)(5). Petitioners' request for a stay of the agency decision pending review was denied by the court of appeals on August 1, 1990.

The court of appeals rejected all of petitioners' claims, with one exception.[1] The majority first addressed the FEIS's discussion of alternatives to the proposed federal action.[2] The court observed that an

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[1] The court found that the FAA had violated the Council on Environmental Quality's NEPA regulations by delegating to the Port Authority responsibility for selecting a consultant to assist in preparing the EIS. Pet. App. 25a-26a (citing 40 C.F.R. 1506.5(c)). The court concluded, however, that this error did not compromise the objectivity or integrity of the NEPA process. Pet. App. 26a. After finding, however, that the consultant had not completed a disclosure form required by regulation, the court ordered the FAA to have the appropriate form executed and to determine whether a conflict of interest existed. *Id.* at 26a-27a. On September 5, 1991, the consultant submitted its statement. On October 2, 1991, the FAA issued a finding that there was no conflict of interest. Petitioners have not raised that issue here.

[2] Judge Buckley dissented on the issue of alternatives. In his view, the FAA failed to inquire adequately into the feasibility of other locations for Burlington's operation and failed to consider the economic impacts of Burlington's move on Fort Wayne. Pet. App. 37a-46a.

agency is required to analyze only "reasonable" alternatives, and that a reasonable alternative must bring about the ends of the federal action at issue. Pet. App. 10a. While noting the FAA's statutory mandate to nurture the establishment of air cargo hubs, *id.* at 13a, 15a, the court also observed that Congress had made the free market, and not the FAA, arbiter of where private companies should locate such hubs. *Id.* at 15a-16a. Because the Port Authority's proposal was directed to creating an efficient cargo hub *at Toledo*, the court found it reasonable for the FAA to restrict its analysis to alternatives that would accomplish that goal. *Id.* at 16a-17a, 30a. The court finally rejected petitioners' contention that the FAA should have defined the proposal's "general goal" as building a permanent hub for Burlington, for which Fort Wayne was in their view a reasonable alternative. *Id.* at 18a-20a.

The court next upheld the adequacy of the FEIS's discussion of noise impacts from the proposed hub. Pet. App. 21a-24a. The court also affirmed the FAA's determination, pursuant to Section 4(f) of the Department of Transportation Act (49 U.S.C. 303(c)), that there was no "prudent and feasible alternative" to the proposal's "use" (through increased noise) of a nearby campground, and that moving the campground to a quieter area satisfied the necessity for "all possible planning to minimize harm." Pet. App. 27a-32a. Finally, the court sustained the FAA's findings under Section 509(b)(5) of the AAIA, 49 U.S.C. App. 2208(b)(5), that leaving Burlington's hub in Fort Wayne was not a "feasible and prudent alternative" to the proposal, and that "all reasonable steps have been taken" to minimize the proposal's adverse effects. Pet. App. 32a-37a. In connection with the requirement of taking "reasonable steps" in

mitigation, moreover, the court determined that the FAA had "reasonably concluded that a detailed mitigation plan, coupled with grounds to believe that the plan will be implemented, is enough of a 'reasonable step.'" *Id.* at 36a.[3]

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court. In addition, while the court's opinion criticizes the reasoning of a decision of the Court of Appeals for the Seventh Circuit, there is no direct conflict between the two decisions. In any event, the decision below turns on the particular circumstances of this case and presents no question of general importance meriting the review by this Court.

1.a. As the court of appeals opinion observes, Pet. App. 9a-10a, NEPA's requirement that an agency consider "alternatives to the proposed action," 42 U.S.C. 4332(2)(C)(iii), "must be bounded by some notion of feasibility." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 551 (1978). Thus, compliance with the requirement that an agency's EIS consider alternatives to the proposed action is evaluated under a "rule of reason." *E.g.*, *Allison* v. *Department of Transportation*, 908 F.2d 1024, 1031 (D.C. Cir. 1990); *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1020 (9th Cir. 1986), cert. denied, 484 U.S. 870 (1987); *City of New York* v. *Department of Transportation*, 715 F.2d 732, 742-743 (2d Cir. 1983),

[3] Construction of the sorting facility, ramp, and related facilities was completed in August 1991, and Burlington moved its operations to Toledo that same month. Operations began in September, and construction of the runway extension is ongoing.

cert. denied, 465 U.S. 1055 (1984).[4] Moreover, the question of what constitutes a reasonable alternative, such that an agency must consider in detail its environmental impact, is necessarily informed by the objectives of the proposal before the agency. Pet. App. 10a; accord, *e.g.*, *City of Angoon*, 803 F.2d at 1021; *Louisiana Wildlife Federation* v. *York*, 761 F.2d 1044, 1048 (5th Cir. 1985); *City of New York*, 715 F.2d at 742-743; *Roosevelt Campobello International Park Comm'n* v. *EPA*, 684 F.2d 1041, 1046-1047 (1st Cir. 1982). The responsibility for defining the objectives of an action is committed to the agency's judgment in the first instance. *City of Angoon*, 803 F.2d at 1021.

Petitioners do not dispute those governing principles, but contend that the court of appeals misapplied them in this case. Specifically, petitioners claim that the FAA erred in defining the purpose of the relevant proposal as being to create a cargo hub in Toledo. In their view, the FAA should have defined the proposal's goals in terms of Burlington's need for a new cargo facility, a need which they contend could have been fulfilled in Fort Wayne as easily as in Toledo. Pet. 17-19.[5] The FAA's failure to focus on Burling-

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[4] The governing regulations confirm that reasonableness is the guiding standard for evaluating the range of alternatives addressed by an EIS. See 40 C.F.R. 1502.14(a) (agency shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated"); Section 1502.14(c) (agency shall "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency"); Section 1508.25(b)(2) (scope of EIS must consider "[o]ther reasonable courses of actions").

[5] In the court of appeals, as here, petitioners argued that Fort Wayne was the only alternative location that the FAA was required to consider in its EIS. Pet. 10 n.4.

ton's objective, petitioners contend, violated NEPA by relying on the Port Authority's "preference" for a Toledo-based cargo hub to define the range of alternatives for purposes of the EIS. Pet. 13.

That fact-specific contention, however, is without merit. The FEIS prepared by the FAA in this case fully complied with the Council on Environmental Quality's (CEQ) interpretations of NEPA, which are "entitled to substantial deference." *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979). The FEIS "rigorously explored and objectively evaluated" the impacts of "all reasonable alternatives," and it included "other alternatives, which [were] eliminated from detailed study with a brief discussion of the reasons for eliminating them." *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (1981) (*NEPA Questions*). Even if, as petitioners claim, the objective of the proposal before the FAA was properly viewed from the perspective of Burlington's transportation needs, the FAA properly considered, and rejected as infeasible, the creation of a cargo hub at Fort Wayne. See Pet. App. 59a; FEIS 2-15. In finding that Fort Wayne was not a reasonable alternative, the FAA cited (a) difficulties in ground travel between the Fort Wayne airport and Burlington's principal markets, (b) the inadequacy of the local labor pool in Fort Wayne, (c) needed improvements in Fort Wayne's airport facilities, and (d) a shortfall in financing necessary to make improvements. *Ibid.* As the CEQ has instructed, "[r]easonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense." *NEPA Questions*, 46 Fed. Reg. 18,027 (1981) (emphasis omitted). Thus, contrary

to petitioners' contention, Pet. 16, the FAA's elimination of Fort Wayne from further consideration properly rested on valid reasons consistent with the CEQ guidelines.[6] There is no basis for the contrary conclusion, advanced by petitioners, that the FAA improperly defined the reasonable alternatives as being those which were "simply desirable from the standpoint of the applicant." *NEPA Questions*, 46 Fed. Reg. 18,027 (1981) (emphasis omitted).

In any case, what the FAA had before it was in fact the Port Authority's proposal for a Toledo-based cargo hub. Contrary to the suggestion of petitioner, Pet. 17, and the dissent, Pet. App. 44a-45a, it was not error for the court of appeals to credit the project applicant's objectives in determining what reasonable alternatives could achieve the goals of the proposed federal action. *Id.* at 16a-18a. Such a focus not only is logically inevitable when a federal agency is asked to approve the specific proposal of a nonfederal entity, but also is in accord with the CEQ's interpretation of NEPA. In clarifying the criteria for evaluating alternatives to a proposal by a permit or license applicant, the CEQ approvingly cited and discussed the First Circuit's decision in *Roosevelt Campobello*, *supra*, which had approved EPA's processing under NEPA of a permit application for a refinery and deep-water terminal. *Guidance Regarding*

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[6] The dissent, Pet. App. 40a-43a, faulted the thoroughness of the FAA's inquiry into the technical and economic factors that supported its conclusion that Fort Wayne was not a reasonable alternative. As discussed, however, the FAA cited very specific considerations supporting its conclusion that Fort Wayne was not a viable alternative to Toledo as a cargo hub for Burlington. In any case, the fact-specific disagreement between the majority and dissent in this case does not warrant further review by this Court.

NEPA Regulations, 48 Fed. Reg. 34,263, 34,267 (1983). Of direct relevance here, the CEQ approvingly observed that "[t]he court determined that EPA's choice of alternative sites was 'focused by the primary objectives of the permit applicant . . .' and that EPA had limited its consideration of sites to only those sites which were considered feasible, given the applicant's stated goals." *Ibid.* (quoting *Roosevelt Campobello*, 684 F.2d at 1047). This, the CEQ concluded, was "in keeping with the concept that an agency's responsibilities to examine alternative sites has always been 'bounded by some notion of feasibility' to avoid NEPA from becoming 'an exercise in frivolous boilerplate.'" 48 Fed. Reg. 34,267 (1983) (quoting *Vermont Yankee*, 435 U.S. at 551). Hence, petitioners' argument, Pet. 17, that the FAA's selection of reasonable alternatives for environmental impact analysis could not be informed by the Port Authority's project goals is misplaced.[7]

Finally, as the court of appeals properly concluded in this case, Pet. App. 15a-16a,[8] Congress has given air carriers, and not the FAA, the right to determine the optimum routing of cargo. Thus, the Federal Aviation Act provides that it is "in the public interest, and in accordance with the public convenience and necessity" for regulators to place "maximum reliance on competitive market forces and on actual and po-

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[7] Petitioners thus also err in asserting, Pet. 16-17, that the court created a new standard for proposals by private applicants.

[8] The court, Pet. App. 15a, cited, *inter alia*, the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, and the accompanying signing statement, 14 Weekly Comp. Pres. Doc. 1837, 1838 (Oct. 24, 1978), which embraced a free-market approach to the regulation of air transportation.

tential competition * * * to provide [for] the needed air transportation system." 49 U.S.C. App. 1302 (a)(4). In addition, with respect to all-cargo service, the Act further provides that it is in the "public interest" for regulators to achieve "[t]he encouragement and development of an integrated transportation system, relying upon competitive market forces to determine the extent, variety, quality, and price of such services." Section 1302(b)(2). Thus, petitioners err in asserting, Pet. 19-20, that the FAA acted improperly in addressing the merits, *vel non*, of the proposal before it, rather than using NEPA to evade the market-oriented policy established by Congress and instead to determine whether the public interest would be better served by having Fort Wayne, rather than Toledo, as Burlington's cargo hub.[9] Cf. *Suburban O'Hare Comm'n* v. *Dole*, 787 F.2d 186, 196 (7th Cir.) ("The decision to make O'Hare, or any other airport, a 'hub' airport belongs to the airlines and not to the Government."), cert. denied, 479 U.S. 847 (1986).

b. The decision of the court of appeals in this case does not conflict with *Van Abbema* v. *Fornell*, 807 F.2d 633 (7th Cir. 1986), which arose in a distinct legal and factual context. There, a private company applied for a permit under the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. 403, to place a dock in a navigable waterway. 807 F.2d at 636. Before granting such a permit, the Army Corps of Engineers must not only comply with NEPA but also perform a "public interest review," in which it ex-

[9] As the court correctly observed, Pet. App. 15a, moreover, the FAA's decision here also comports with Congress's direction to foster the development of cargo hubs. See 49 U.S.C. App. 2201(a)(7) and (11).

plicitly balances the benefits of the proposed facility against reasonably foreseeable detriments. *Id.* at 638 (citing 33 C.F.R. 320.4(a)). In view of the requirement in the applicable regulations that the Corps "conduct an overall public welfare review," the court of appeals held that the Corps, "as guardian of the public welfare, * * * must credibly attempt to appraise [the] economic benefit" arising from the proposal. 807 F.2d at 639. The Corps therefore could not merely rely on the free market to determine that the proposal in question, and not some alternative, would serve the overall public welfare. *Ibid.*

In contrast to the corps' legal responsibilities considered in *Van Abbema*, the FAA's preparation of the FEIS occurred in a statutory context that commits the allocation of cargo services to the free market. As discussed, the FAA is without authority to determine that the public welfare would be better served if Burlington were to select a cargo hub other than Toledo. Rather, Congress has explicitly deemed it in the public interest to leave such determinations to "competitive market forces." 49 U.S.C. App. 1302(a)(4) and (b)(2). Because Congress has chosen to rely on the market, and not a federal agency, to allocate resources in this context, it was not aribtrary or capricious of the FAA to have forgone extensive inquiry into the environmental impacts of an alternative that it, but not Burlington, might have viewed as preferable to Toledo. Accordingly, *Van Abbema* and the decision here involve differing statutory and regulatory responsibilities and hence are not in conflict.

The *Van Abbema* court also concluded that the Corps' consideration of alternatives was inadequate based on specific allegations that much of the infor-

mation the Corps received was "inaccurate and unverified." 807 F.2d at 642. After examining the data submitted by the applicant regarding six alternative sites for the proposed facility, the court concluded that the Corps had "relie[d] upon a record replete with important factual inconsistencies and ambiguities that the Corps did not attempt to resolve." *Ibid.* In contrast, petitioners here have claimed not that the FAA based its decision on erroneous underlying data, but that the agency should have assembled additional data in order to identify and analyze another business alternative that Burlington may have had.

It is true that the majority in this case criticized, Pet. App. 19a, the *Van Abbema* court's observation that agencies should evaluate the "alternative means to accomplish the general goal of an action; * * * [and] not * * * the alternative means by which a particular applicant can reach his goals." 807 F.2d at 638 (emphasis omitted). Petitioners, however, would not be entitled to relief here based on the formulation criticized. Particularly in view of the FAA's statutory obligation to foster the development of new cargo hubs, 49 U.S.C. App. 2201(a)(7) and (11), it is far from self-evident that providing a cargo hub for a particular carrier (Burlington) is a more "general" goal than establishing a new cargo hub in a particular city (Toledo). *Van Abbema*, moreover, can be read consistently with the view that the latter is the "general goal" of the federal action here. The *Van Abbema* court identified the relevant "general goal" in that case as being "to deliver coal from mine to utility," 807 F.2d at 638, a goal that could be achieved through means other than building a facility at the site proposed by the applicant. But what is crucial is that the goal, however generally defined, was nonethe-

less defined in terms of the federal action sought by *the project applicant*, who would be making the coal deliveries in question. *Id.* at 635. In this case, the applicant is the Port Authority, and the "general goal" of the action *it* seeks—the creation of a cargo hub in Toledo—can be achieved only in Toledo.[10]

2. Under the AAIA, § 509(b)(5), 49 U.S.C. App. 2208(b)(5), the FAA may not approve a project having a significant adverse effect on the environment unless it finds that "no feasible and prudent alternative exists and that all reasonable steps have been taken to minimize [the] adverse effect." Petitioners contest, Pet. 20-24, the FAA's finding that the commitments obtained from the Port Authority for a program of property acquisition and sound insulation, see pp. 3-4, *supra*, were "reasonable steps" to minimize the adverse effects of noise from the cargo hub.[11] Their claim, which reduces to a disagreement

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[10] Moreover, petitioners have cited nothing in NEPA, its implementing regulations, or any decision construing it, that suggests that the goal of a proposal must be defined to maximize the number of alternative ways of achieving it. Requiring a project's goals always to be defined at the *most* alternative-intensive level of generality would offend the "[c]ommon sense * * * teach[ing] * * * that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man." *Vermont Yankee*, 435 U.S. at 551.

[11] Petitioners do not independently contest the court's conclusion that the FAA's approval of the project complied with § 509(b)(5) of the AAIA, 49 U.S.C. App. 2208(b)(5), and § 4(f) of the Department of Transportation Act (49 U.S.C. 303(c)), because of the absence of a "feasible or prudent" alternative. Pet. App. 27a-31a, 33a. Rather, they argue merely that a violation of NEPA's requirement to consider alternatives to a proposal would also violate those other two

with the FAA over what steps were reasonable on the facts and circumstances of this case, merits no further review.

The court of appeals properly found, based on the Port Authority's commitments, that the FAA reasonably concluded that "all reasonable steps have been taken to minimize" the project's adverse effects. 49 U.S.C. App. 2208(b)(5); Pet. App. 36a. Respondents contend, without citation of a single case interpreting the statute, that the AAIA's use of the phrase "have been taken" precludes the FAA from relying on commitments for future mitigation activities. That argument cannot be squared with the realities of administering the AAIA. Because the FAA must make its finding when it approves a project, the actual mitigation steps cannot have been taken at that time (particularly since mitigation may be funded by grants which are themselves contingent on the approval). Thus, it is clear that Congress contemplated that the adoption of realistic mitigation plans and commitments might constitute "reasonable steps" to be taken at the time of project approval.[12]

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statutes. Pet. 11 n.5. As discussed, the FAA did not violate NEPA. In any case, assuming *arguendo* that Fort Wayne was a "reasonable" alternative requiring further study in the EIS, it would not necessarily follow that it was a "prudent" alternative for purposes of the AAIA and the Department of Transportation Act. See Pet. App. 29a-31a.

[12] Apparently realizing that mitigation cannot possibly be completed at the time of approval, petitioners fall back on the argument that it must be completed at the time the project first begins operation or at least be implemented through a firm timetable. Pet. 22. Petitioners, however, again fail to cite a single decision supporting their inflexible view of a statute that requires "reasonable" steps to be taken.

As the court below pointed out, "[S]ection 509 (b)(5) does not order agencies to take *all* steps to lessen environmental trauma, just all *reasonable* ones." Pet. App. 36a. In this case, the FAA reasonably concluded that the establishment of "a detailed mitigation plan, coupled with grounds to believe that the plan will be implemented, is enough of a 'reasonable step.'" [13] *Ibid.* Indeed, the FAA specifically committed to take appropriate steps—*e.g.*, conditioning grants on mitigation—to ensure that the Port Authority's program would be implemented. Pet. App. 67a.[14] The court of appeals properly upheld the FAA's conclusion that all reasonable steps had been

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[13] The FAA's decision in this case specified that the Port Authority had committed to purchase homes within the area bounded by the 75 Ldn noise contour and to install insulation in homes and acquire easements in the area between the 65 and 75 Ldn noise contours. Pet. App. 68a-70a. The EIS estimated the cost of this program, FEIS 4-32, and included maps showing which houses fell within the 65 and 75 Ldn contours. The FAA also explained that a study being conducted pursuant to 14 C.F.R. Pt. 150 would further indicate how to minimize noise, and noted that the FAA was imposing conditions on its grants to ensure the Port Authority's compliance. Pet. App. 67a, 69a-71a.

[14] FAA stated its expectation that an ongoing noise study under 14 C.F.R. Pt. 150 would "provide valuable input on timing and priorities" for the mitigation program. Pet. App. 69a. Petitioners imply, Pet. 21 n.8, that the EPA opposed the FAA's reliance on the ongoing Part 150 Noise Compatibility study to fine tune the mitigation program. However, the EPA's official position, as stated in a letter from the EPA Director of the Office of Federal Activities, was that FAA's FEIS was "not 'Environmentally Unsatisfactory,'" based in part on the Port Authority's commitment to broaden its Part 150 study. C.A. App. 51. Thus, EPA relied on the Part 150 study to find that the project was acceptable. That study was completed in August 1991, and is under review at the FAA.

taken,[15] and further review of this factbound question is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1991

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[15] Petitioners' suggestion, Pet. 23, that the court of appeals ignored the difference between procedural and substantive mitigation requirements is incorrect. See Pet. App. 36a (drawing a distinction between NEPA's procedural dictates and the AAIA's "substantive environmental obligations").

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No. 91-397

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

Citizens Against Burlington, Inc., William Reuter
Daniel Kasch, Carol Vaughan, and
Richard VanLandingham, III,

Petitioners,

v.

James B. Busey, IV, Administrator
Federal Aviation Administration
Toledo-Lucas County Port Authority,
and Burlington Air Express, Inc.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The threshold question presented is whether this Court should exercise its discretionary jurisdiction on a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia where that court, after thorough review of a complete administrative record compiled by the Federal Aviation Administration, concluded that the agency fulfilled the requirements of the National Environmental Policy Act and the Airport and Airway Improvement Act, and that the agency acted reasonably and did not commit a clear error of judgment. If this Court determines further review is necessary, the substantive questions which should be considered by the Court are (a) whether the D.C. Circuit acted unreasonably when, on review, it approved of the FAA's definition of reasonable alternatives, which definition excluded alternatives which could not achieve the agency's defined project goals; and (b) whether the D.C. Circuit properly concluded that the discussion of mitigation contained in the Final Environmental Impact Statement ("FEIS") complies with the requirements of AAIA.

PARTIES TO THE PROCEEDINGS

The petitioners in the court of appeals and in this Court are Citizens Against Burlington, Inc., an organization of property owners residing near Toledo Express Airport, and four members of the group, William Reuter, Daniel Kasch, Carol Vaughan, and Richard VanLandingham, III.

The respondents in this Court are James B. Busey, IV, Administrator of the Federal Aviation Administration, who was the respondent in the court of appeals; the Toledo-Lucas County Port Authority, a political subdivision organized and existing pursuant to Chapter 4582 of the Ohio Revised Code which operates Toledo Express Airport and which was an intervenor in the court of appeals; and Burlington Air Express Inc., which was an intervenor in the court of appeals.

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and Burlington Air Express, Inc.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals is reported at 938 F.2d 190 (D.C. Cir. 1991) and appears in the Petitioner's Appendix A ("Pet. App. A") at pages 1a-46a.

The Record of Decision ("ROD") and Order issued by the Federal Aviation Administration on July 12, 1990

are not reported. They are, however, reproduced at Pet. App. C, pp. 49a-134a.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 14, 1991. (Pet. App. B at 47a-48a) Petitioners have invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, provides:

> The Congress authorizes and directs that, to the fullest extent possible: . . . (2) All agencies of the federal government shall –
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> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
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> (i) the environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
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> (iv) the relationship between local short term uses of man's environment and maintenance and enhancement of long-term productivity, and
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> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Section 502(a) of the Airport and Airway Improvement Act (AAIA), 49 U.S.C. app. § 2201(a)(7) and (11), provides:

> (a) In general, the Congress hereby finds and declares that—
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> * * *
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> (7) cargo hub airports play a critical role in the movement of commerce through the airport and airway system and appropriate provisions should be made to facilitate the development and enhancement of such airports;
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> * * *
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> (11) airport construction and improvement projects which increase the capacity of facilities to accommodate passenger and cargo traffic, thereby increasing safety and efficiency and reducing delays, should be undertaken to the maximum feasible extent; . . . .

Section 509(b)(5) of the AAIA, 49 U.S.C. app. § 2208(b)(5), provides:

> It is declared to be national policy that airport development projects authorized pursuant to this chapter shall provide for the protection and enhancement of the natural resources and the quality of the environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretary of the Interior and the Administrator of the Environmental Protection Agency with regard to any project included in a project grant application involving airport location, a major runway extension, or runway location which may have a significant impact on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have significant adverse effect unless the

Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all reasonable steps have been taken to minimize such adverse effect.

STATEMENT OF THE CASE

Respondents' Statement of the Case will focus primarily on correcting certain inaccuracies, omissions or misstatements in the Statement of the Case as presented by petitioners.

In April, 1988, the Toledo-Lucas County Port Authority ("Port Authority"), which operates Toledo Express Airport, began to develop a Master Plan Update Study which included the development of a new airport layout plan ("ALP") (Pet. App. C [*the ROD*] at 49a-50a). At the same time, the airport commenced a Noise Compatibility Planning Study pursuant to 14 C.F.R. Part 150 (the "Part 150 Study") the purpose of which was to identify a program of noise reduction measures and land use controls. (Pet. App. C [*ROD*] at 49a-51a). The Part 150 Study was completed and submitted to the FAA in August 1991, two months after the D.C. Circuit decided the case below.

Subsequent to the initiation of the master plan update, the Port Authority was approached by Burlington Air Express ("Burlington") which was seeking to establish a permanent air cargo hub. (Pet. App. C [*ROD*] at 50a) Since 1985, Burlington had been operating from temporary facilities at Baer Field in Fort Wayne, Indiana. (*Id.*) After examining 17 sites in four midwestern states, Burlington chose Toledo Express Airport to establish its permanent hub. (*Id.*) Toledo Express was chosen for a number of reasons, including its proximity to major geographic and industrial markets (mainly Detroit and Chicago), its excellent access to major highways, the quality of its work force and base of skilled labor, the condition of the airport's existing facilities,

maintenance record and operating efficiency, and the Port Authority's commitment to work with Burlington to secure funding and competitive financing for the new permanent hub. (FEIS 2-1 through 2-2)

For its part, the Port Authority served as sponsor of the project by asking the FAA to approve its revised ALP which depicted the facilities necessary to construct the hub. The Port Authority made this request in its role as the lead agency for economic development in the Toledo metropolitan area, and to ensure that the economic benefits which accompany the project will benefit the Toledo area. The Toledo metropolitan area particularly needs those benefits.[1]

On February 2, 1989, the Port Authority submitted to the FAA its ALP revisions for approval. The FAA immediately commenced the necessary studies to determine the acceptability of the ALP revisions from an airspace utilization standpoint, and commenced the preparation of an environmental impact statement. Throughout that process, the FAA painstakingly analyzed all environmental aspects of the project, and responded to voluminous comments from interested individuals, organizations, and governmental agencies.

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1. Since 1980, over 50 major companies have ceased operations in Toledo and/or closed their facilities resulting in a loss of over 7,000 jobs. Toledo is ranked in the bottom third of the nation's 75 largest cities in job creation and retention, and currently ranks last among the major Ohio urban areas in economic development. Up to 1,150 new full and part time jobs will be created for Toledo residents by the project. An annual economic impact of over $42,000,000.00, growing to over $67,000,000.00 will be injected into the depressed Toledo economy. (Pet. App. C [*ROD*] at 74a)

The majority of funding for the project will come directly from user fees and/or lease agreements, and the sale of land not needed for airport purposes after it has been made compatible, or reimbursed at a later date from such sources, after borrowing money for front end costs. In fact, of the 64.5 million dollars designated for costs other than for mitigation, over 46 million dollars will be derived from bond issues to private investors, and only a very small percentage will be derived from local and state participation for economic development.

In response to comments on the draft environmental impact statement by the EPA, the FAA conducted supplemental studies in the area of noise analysis and wetlands delineation, and obtained assurances that mitigation measures would be carried out expeditiously. (FEIS E-39)

The Final Environmental Impact Statement ("FEIS") was issued May 11, 1990, and the FAA issued its Record of Decision ("ROD") on July 12, 1990. Chapter two of the FEIS contains an extensive discussion of alternatives to the proposal. The FEIS gave detailed consideration both to the proposed action of expanding Toledo Express and to the "no action" alternative. (FEIS 2-2 through 2-6, and Chapter 4) In addition, the FAA considered alternative designs and runway configurations at the airport, and alternative distributions of projected air traffic. (FEIS 2-7 through 2-13) The FAA also considered alternative airports, both in and outside of the Toledo area. (FEIS 2-14 through 2-16)

Petitioners claim that the FAA "[r]efus[ed] to [a]nalyze the Fort Wayne [a]lternative" (Pet. 6), but a review of the record shows that is simply not true. To the contrary, the FAA analyzed the Fort Wayne alternative, but found it to be unreasonable. Specifically, the FAA made the following findings:

> Since 1985, Burlington has operated an interim hub at Baer Field in Fort Wayne, Indiana. . . . However, the air cargo facility at Fort Wayne is antiquated and was not designed specifically as an air cargo hub. . . .
>
> Fort Wayne is 163 miles from Detroit, involving 3 hours of ground travel distance to Burlington's automotive markets. The major highway does not connect with the airport. There is a limited available labor pool, and Burlington has experienced difficulty attracting skilled workers and part time employees. At Baer Field, a new building, ramp, and other airport improvements are needed. Fort Wayne was

> unable to put together a competitive funding package and development plan for a permanent hub.
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> Given these negative factors at Fort Wayne and the advantages of the Toledo Express Airport. . . Fort Wayne is not a reasonable alternative to Toledo for Burlington. Burlington officials have indicated their intention to renew their search for another location should the Toledo Express Airport prove to be unavailable to them. For these reasons, an expanded air cargo facility at Fort Wayne was not evaluated further as an alternative in this document. (emphasis added)

(FEIS 2-14; *see also* Pet. App. C [*ROD*] at 56a-64a). These findings were supported by substantial evidence in the record. (FEIS B-94 through B-96, E-21 through E-33, E-62 through E-64)

Petitioners mischaracterize the record when they assert that Burlington selected Toledo "primarily because Toledo offered it millions of dollars in local, state and federal funds to locate its hub there", without mentioning other important considerations. (Pet. 6) Of course, the package of state, local and private funding designed by Toledo was a factor in Burlington's choice of Toledo, but the FEIS and ROD also made specific findings based on record evidence as to Toledo's proximity to major industrial markets, particularly the automotive industry which accounts for a substantial part of Burlington's business, the inadequacy of the Fort Wayne facilities, Toledo's superior work force including part time college students, the major north-south and east-west highways that cross in Toledo, the foreign trade zone in Toledo and strong community support. (Pet. App. C at 62a) Based on all of this evidence in the record – not just financing – the FAA made the findings cited above.

It is equally incorrect for petitioners to claim that Fort Wayne was Burlington's "backup alternative if its plans for Toledo fell through". (Pet. 8) A dispassionate

review of the record and Burlington's own evaluation of Fort Wayne indicates that Fort Wayne was simply not a practical or reasonable alternative for a number of reasons. Establishing a permanent facility for Burlington at Fort Wayne would require the construction of essentially the same new facilities as those required for Phase I of the construction at Toledo, *i.e.*, a new sortation facility, an aircraft parking ramp, a fuel farm and related infrastructure and other airport improvements. (FEIS 2-15, B-93) It is the responsibility of the airport, not the carrier, to pay for some of these improvements, and the FAA cannot direct any airport to make necessary improvements in its infrastructure to accommodate an airline. There has never been a financial program in place, or even proposed, that would provide a basis for establishing these improvements which are necessary for a permanent hub in Fort Wayne. (FEIS B-93)

Petitioners claim that the Director of the Fort Wayne Airport represented in a letter dated April 25, 1990 that locating a facility there was feasible, and even claim that in an extra-record letter the Chairman of Burlington admitted Fort Wayne was its "backup alternative". (Pet. 7-8)[2] In fact, meetings on financing between Burlington and Fort Wayne officials never proceeded beyond a very general stage. At no time during the course of many discussions did any representative of the Chamber of Commerce, the Airport Authority or its investment banking company ever offer any specific package for the financing of a permanent hub facility at Fort Wayne. (FEIS B-93, E-28)

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2. Those letters are not a part of the FAA record in this case and therefore were not properly before the court below or this Court. Since the issue as to these letters was not raised before the FAA, Section 1006(e) of the Federal Aviation Act (49 U.S.C. § 1486(e)) prohibits consideration of them. Nevertheless, if those letters are relied upon, Burlington's response to them in Burlington's Answer to Petitioners' Request for a Stay and Burlington's Surreply should also be considered.

In short, the evidence before the FAA indicated that while it was possible for Burlington to remain in Fort Wayne temporarily – which might be accomplished with the continuing goodwill and support of both the Air National Guard and Fort Wayne, *albeit* at a great cost – it was not feasible to establish a permanent hub at Fort Wayne for the reasons set forth in the FEIS (FEIS 2-15), and in Mr. Marshall's June 27, 1990 letter. (Respondent's Appendix ("Resp. App.") A; *see also* Resp. App. B) The May 2, 1990 letter from Burlington's Chairman (Pet. App. E), at most, only recognizes that Burlington might need Fort Wayne's help to remain there on a temporary basis a while longer. The vague and indefinite statements contained in the letter can hardly be interpreted as an admission that "Fort Wayne was Burlington's backup alternative". (Pet. 8)

In addition to the discussion of alternatives, the FEIS also contained a full and fair discussion of the noise impacts, including impacts on sleep, that the project would produce. (FEIS Chapter 4) That document and the ROD also presented a detailed plan for mitigating the noise impacts of the proposal by eliminating "almost all existing noncompatible land uses within the 65 L_{dn} noise contour." (Pet. App. C [*ROD*] at 69a) The ROD stated that a total of approximately 100 residences and two nursing homes within the 75 L_{dn} contour will be acquired and residents will be relocated. (Pet. App. C [*ROD*] at 68a) Further, the ROD states that the Port Authority will assemble a relocation team to accomplish the process with as little disruption as possible to the residents. The Port Authority has committed to implement a sound attenuation or easement acquisition program for houses within the 65-75 L_{dn} corridor. (Pet. App. C [*ROD*] at 69a) The Port Authority has committed to take appropriate actions within its powers to implement the mitigation program with or without federal funds. (FEIS E-39)

The mitigation program described in the FEIS and ROD is now well underway. The Part 150 Study, which

is intended to help flesh out the details of the mitigation plan, was completed and submitted to the FAA in August of 1991, before the completion of the hub and the commencement of flight operations, which occurred in September 1991. The Port Authority has been informed by the FAA of an allocation of $7.4 million of Airport Improvement Program discretionary grant funds to be used for property acquisitions. This amount is an increase of approximately $2.6 million in FAA grant funds since the case was argued before the court below. Even before flight operations commenced, the Port Authority, through its relocation consultant, had made many offers to purchase properties, and had received numerous written acceptances. The process of obtaining property appraisals and making offers is on-going at the time this brief is being written.

REASONS FOR DENYING THE WRIT

I. This Court Should Not Grant Certiorari Because the D.C. Circuit Properly Reviewed the FAA's Definition of Reasonable Alternatives and Because its Decision is Not in Conflict with the Seventh Circuit

A. The Decision Below Is In Accord with the Court's Limited Authority on Review

The D.C. Circuit's review of the Record of Decision ("ROD") issued by the FAA on the question of "alternatives" was fully consistent with the requirements for review established by this Court. This Court has held that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot " 'interject itself within the area of discretion of the executive as to the choice of the action to be taken' " ". *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980), *citing Kleppe v. Sierra Club*, 427 U.S. 390 and 410 n.21 (1976)). In *Kleppe*, this Court emphasized that neither NEPA nor its legislative history contemplate that a court may substitute its judgment for that of the agency as to the environmental consequences of its action. (*Kleppe, supra*, at 410 n.21)

Review of an agency's discussion of alternatives in an FEIS is made pursuant to a "rule of reason", by which a court determines whether the FEIS contains sufficient discussion of the relevant issues and opposing viewpoints to permit the decision maker to take a "hard look" at the environmental factors, and to make a reasonable decision. (*See id*)

Obviously, a discussion of alternatives cannot be limitless. CEQ regulations obligate agencies to discuss only "reasonable" alternatives. In much the same way, AAIA only requires a finding that no "feasible and prudent" alternative exists to the proposed project. This Court recognized that it is senseless to require more of

an agency when it observed in *Vermont Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519, 551 (1978) that "the concept of alternatives must be bounded by some notion of feasibility." Thus, the D.C. Circuit correctly recognized in this case that the FAA was required only to discuss feasible, prudent, and reasonable alternatives. (Pet. App. A [*the D.C. Circuit Opinion* ("*D.C. Op.*")] at 9a-13a) The court below concluded that the FAA's FEIS met those requirements — a conclusion fully borne out by an examination of the FEIS and ROD.

The record shows, as the D.C. Circuit noted, that five alternatives to the proposal were identified in the FEIS. Three alternatives, which were identified and discussed, were rejected for more detailed analysis as unreasonable alternatives, including the alternative of locating the hub outside of Toledo. Specifically, the FAA found that "Ft. Wayne is not a reasonable alternative to Toledo for Burlington." (FEIS 2-1, 2-2, 2-15)[3] After examination of the ROD and FEIS, the D.C. Circuit concluded that the FAA's reasoning as set forth in the FEIS "fully supports this decision to evaluate only the preferred and do nothing alternatives." (Pet. App. A [*D.C. Op.*] at 15a)

The D.C. Circuit explained that the FAA reviewed a variety of factors before making this decision. In particular, the FAA examined Congress' expressed views on how the nation is to build civilian airports. Congress has declared that cargo hub airports play a critical role in the movement of commerce throughout the airport and airway system and appropriate provisions should be

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3. The FAA's decision to eliminate the alternative of Burlington remaining in Fort Wayne was supported by substantial evidence in the FEIS, and was reinforced and amplified in the ROD. (*see* FEIS 2-14; Pet App. C [ROD] at 56a-64a; and p.7, *supra*) These findings of fact are supported by substantial evidence in the record (FEIS B-94 through B-96, E-21 through E-33, E-62 through E-64), and thus are conclusive as provided in Section 1006(c) of the Federal Aviation Act. (49 U.S.C. § 1486(c))

made to facilitate the development and enhancement of such airports. (AAIA § 502(a)(7); 49 U.S.C. app. § 2201(a)(7)) Further, airport construction and improvement projects which increase the capacity of facilities to accommodate passenger and cargo traffic "should be undertaken to the maximum feasible extent". (AAIA § 502(a)(11); 49 U.S.C. app. § 2201(a)(11))

The D.C. Circuit further explained "[c]ongress has also said that the free market, not an ersatz Gosplan for aviation, should determine the siting of the nation's airports". (Pet. App. A [*D.C. Op.*] at 15a) Prior to the deregulation of air cargo transportation, the Federal Aviation Act regulated every aspect of air transportation, including the routes a cargo carrier could operate and the cities it could serve. (*See National Small Shipments v. CAB*, 618 F.2d 819 (D.C. Cir. 1980). Under deregulation, Congress decreed that such matters should be decided by private management pursuant to "competitive market forces." (*Id.* at 823; *see also* Section 102(a)(4) and (b)(2) of the Federal Aviation Act, 49 U.S.C. § 1302(a)(4) and (b)(2)). Therefore, as the Court stated in *Suburban O'Hare Commission v. Dole*, 787 F.2d 186, 196 (7th Cir.) *cert. denied*, 479 U.S. 847 (1986), "[t]he decision to make O'Hare, or any other airport a 'hub' belongs to the airlines, and not to the government." These Congressional policies clearly limit the extent to which the federal government can exert authority over hub placement decisions and, thus, were important considerations for the FAA when determining the scope of alternatives which were feasible, prudent and reasonable.

In addition, the FAA took into consideration the Port Authority's reasons for proposing that the cargo hub be built in Toledo. The information in the FEIS established that the Port Authority pushed for development of the hub at Toledo Express in order to reinvigorate the Toledo economy. The project was expected to create hundreds of jobs, pump millions of dollars into the local economy, and attract spin-off business to the area.

Based upon these considerations and other information in the FEIS, the FAA defined the goal for its action as the establishment of a new cargo hub for Burlington Air Express in Toledo. (Pet. App. A [*D.C. Op.*] at 17a) The agency eliminated from detailed discussion those alternatives which would not accomplish this goal, including alternatives of locating the hub airport elsewhere. (*Id.*) The D.C. Circuit found that the FAA's decision making process was valid and that the agency acted reasonably in defining the purpose of its action, in eliminating alternatives that would not achieve that purpose, and discussing the alternative that would achieve that purpose. (Pet. App. C [*D.C. Op.*] at 18a) Given the policy directives of Congress, the limited scope of review authority vested in the Court of Appeals, and the analysis engaged in by the agency, that decision was clearly correct and need not be reviewed here.

B. The D.C. Circuit Decision Is Not in Conflict with Seventh Circuit Precedent

In requesting that this Court review the decision of the D.C. Circuit, petitioners primarily rely upon the Seventh Circuit's decision in *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986). *Van Abbema* involved the review, by the U.S. Army Corps of Engineers, of the environmental impact of the construction and operation of a facility designed to "transload" coal from trucks to barges along the Mississippi River. During the course of this review by the Corps, several parties raised specific objections concerning the false, misleading and inaccurate data provided by the project sponsor concerning the economic viability of alternatives to the proposed project. *Van Abbema*, 807 F.2d at 640. The Corps, without any regard for these objections or any investigation into the accuracy of the disputed data, accepted the factual assertions made by the project sponsor as true and, after reversing the decision of the local district engineer that the project was not in the public interest, granted a

permit for the construction and operation of the transloading facility.

The *Van Abbema* court found fault in the Corps' evaluation of alternatives to the proposal, stating that:

> the Corps, in considering alternative sites, relies upon a record replete with important and factual inconsistencies and ambiguities that the Corps did not attempt to resolve.

(*Id.* at 642) When specifically addressing the issue of whether the Corps adequately evaluated the alternative of utilizing the temporary facility at Quincy, the court further stated:

> [a] review of the record reveals that the Corps never adequately evaluated Quincy, the "no build" alternative. The only comments directed to Quincy were based on false data or unexplained assumptions.

(*Id.* at 640) In further expounding upon the issue of false data, the *Van Abbema* court noted that "no one now contends that these mileage figures are right." (*Id.* at 641) The D.C. Circuit did not find any such errors of fact in this case.

It was the Corps' blind reliance upon factually deficient data which was the focus in the Seventh Circuit's decision to reverse the district court's endorsement of the Corps' analysis of alternatives in *Van Abbema*. The Corps' duty to conduct an independent investigation into the adequacy of an evaluation of alternatives, which petitioners contend extends from *Van Abbema* to all cases in which an agency utilizes information provided by a project sponsor or other outside party (Pet. 20), was imposed in *Van Abbema* because the Corps relied upon false facts in the record after the validity of those facts had been specifically challenged.

Furthermore, the Seventh Circuit, in *Van Abbema*, clearly delineated the court's role in reviewing an agency's evaluation of alternatives when it stated:

> Here the Corps did undertake a serious review of alternatives to the proposal. . . [and] [s]uperficially at least there appears to be record evidence to support the Corps' decision that no preferable alternatives exist. . . . Generally, that would end the matter, and we would agree with the district court that the Corps' decision was not arbitrary or capricious and would uphold the issuance of the permit. However, the attorney general, in particular, contends that the Corps based its conclusions on evidence so inadequate and misleading that we must undertake a closer scrutiny. The plaintiffs and the intervenor have a point to the extent that the Corps' conclusions must find some reasonable support in the record. (emphasis added)

(*Van Abbema* at 639 (*citations omitted*)) Therefore, according to the *Van Abbema* court, in instances where the data underlying an agency's decision is not false, the agency's "serious review of alternatives" should be given deference, and an "arbitrary and capricious" standard, under which the agency's determination must merely "find some reasonable support in the record", should be the rule of law. (*Id.*)

The D.C. Circuit, in holding that the FAA's "judgment [in evaluating alternatives] was not uninformed" (Pet. App. A [*D.C. Op.*] at 20a, *citing Robertson v. Methow Valley*, 490 U.S. 332 (1989)), made no finding that the FAA relied on false, misleading or inaccurate data. Therefore, the decision by the D.C. Circuit not to second-guess the reasoned evaluation of alternatives by the FAA does not conflict with the Seventh Circuit's holding in *Van Abbema*.

Van Abbema and the present case turn primarily on the facts unique to each situation. For this reason, each court's analysis is equally unique. The D.C. Circuit's determination that the language of *Van Abbema* was too broad (Pet. App. A [*D.C. Op.*] at 19a) is correct. The Seventh Circuit's assertion that an agency must evaluate alternatives to achieve the "general goal" of a project

is so broad that it would require examination of impractical, unfeasible and irrelevant alternatives. Such a result would undermine this Court's holding in *Vermont Yankee*, *supra*, and thus was rightfully criticized by the D.C. Circuit. In any event, it is not necessary for this Court to examine the broad language of *Van Abbema* because the undisputed factual errors in that case clearly required the Seventh Circuit to reverse the decision of the district court so that the Corps could reexamine the alternatives based on the correct facts. When the two cases are properly read, based on their unique facts, there is no conflict of legal principle which requires resolution by this Court.

In short, petitioners are asking the Court to grant certiorari in this case so that this Court may resolve a nonexistent conflict among the circuits. The practical implication of petitioners' request is that they are asking this Court to review the opinion of the D.C. Circuit so that the Court can impose a broad, burdensome duty upon federal agencies that no court in this country, including the Seventh Circuit, has said it would be willing to impose.

C. The Decision Below Does Not Authorize Agencies to Abdicate the Responsibility to Define Alternatives

Petitioners also claim that the D.C. Circuit holding authorizes agencies to abdicate the role of defining reasonable alternatives to private project sponsors. (Pet. 19) A careful reading of the Opinion below and the ROD reveal, however, that the D.C. Circuit did no such thing. To the contrary, the FAA, and not the Port Authority, or even Burlington, made the final decision as to the scope of reasonable alternatives that required discussion in the FEIS, and it was that decision making process which the Court below approved.

The D.C. Circuit repeatedly emphasized throughout its Opinion that the responsibility for deciding what alternatives to consider in an FEIS belongs to the

agency. ("An agency bears the responsibility for deciding which alternatives to consider in an FEIS." (Pet. App. A [*D.C. Op.*] at 11a, *citing North Slope Borough v. Andrus*, 642 F.2d 589, 601 (D.C. Cir. 1980)). In fact, the D.C. Court stressed ". . . it [an agency] must evaluate alternative ways of achieving its goals, shaped by the application at issue and by the function that the agency plays in the decision process." (Pet. App. A [*D.C. Op.*] at 19a (emphasis in the original)) Given this kind of language, it is clear that the D.C. Circuit decision does not create precedent permitting applicants to define the goals and scope of alternatives to be included in an impact statement. Rather, the D.C. Circuit specifically recognized that this responsibility remains vested in the agency. Therefore, petitioners' stated reason for review in this Court – that the decision allows nonfederal applicants to define and control the alternatives analyzed in an impact statement – is without foundation.

In this case, the Port Authority's status as the applicant seeking approval of a specific project, and the Congressional limitations placed on federal government involvement in private decisions regarding the development of hub airports, defined the limits of the reasonable alternatives which the FAA believed should be considered. The FAA in its expertise made this discretionary decision itself after consideration of the nature of the project involved. It did not, as petitioners' contend, abdicate the responsibility for developing of alternatives to either the project sponsor, or the project beneficiary. When the D.C. Circuit refused to second-guess the agency's decision regarding the scope of alternatives requiring full examination, it did not sanction the abandonment of the responsibility for defining alternatives to the project sponsor. Instead, as the Opinion makes clear, it merely refused to criticize an agency decision-making process which included consideration of the nature of the project, the identity of the applicant, and the extent of permitted federal involvement in the proposed project.

D. An Agency May Take Into Account the Goals of a Project Sponsor

In essence, petitioners object to the FAA's decision to take into account the needs and goals of the sponsor. (*But see* Pet. App. A [*D.C. Op.*] at 12a, 16a (holding that FAA may take such considerations into account)). The FAA's decision to take into account the needs of the Port Authority when defining the scope of alternatives and goals for the project is clearly not in violation of any regulatory or statutory mandate. It actually represents the proper understanding of the limited role agencies play in such projects. Petitioners' argument is nothing more than an attempt to have the D.C. Circuit and now this Court, substitute their judgment on the weight given this factor for that of the agency, a standard repeatedly rejected by this Court. (*E.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971))

Petitioners assert that the Council on Environmental Quality ("CEQ") has stated, in defining which alternatives are feasible, "[n]either NEPA nor CEQ regulation make a distinction between actions initiated by a federal agency and by applicants." (Pet. 16, *citing CEQ Guidance Regarding NEPA Regulations* [48 Fed. Reg. 34263, 34266 (July 28, 1983)]). In fact, the CEQ actually pointed out, in that same document, that an agency should consider an applicant's purposes and needs when defining the goals of a project. The CEQ said:

> NEPA has never been interpreted to require examination of purely conjectural possibilities whose implementation is deemed remote and speculative. Rather, the agency's duty is to consider "alternatives as they exist and are likely to exist"
>
> * * *
>
> There is, however, no need to disregard the applicant's purposes and needs and the common sense realities of a given situation in the development of alternatives. (emphasis added)

The CEQ made these comments in response to a decision by the First Circuit in *Roosevelt Campobello International Park Commission v. U.S. Environmental Protection Agency*, 684 F.2d 1041 (1st Cir. 1982), which recognized that an agency's choice of alternatives may be focused by the primary objectives of the permit applicant. In that case, the court stated:

> EPA's evaluation of alternatives was explicitly based on the premise that its role in reviewing privately sponsored projects "is to determine whether the proposed site is environmentally acceptable", and not, as in the case of a publicly funded project, "to undertake to locate what EPA would consider to be the optimum site for a new facility". . .
>
> We are unable to fault EPA's reasoning. . . No purpose would be served by requiring EPA to study exhaustively all environmental impacts at each alternative site considered once it has reasonably concluded that none of the alternatives will be substantially preferable to the proposed site. Moreover, the guideline adopted by EPA to limit its study of alternatives appears, in this case, to be consistent with the "rule of reason" by which a court measures federal agency compliance with NEPA's procedural requirements.

(*Roosevelt Campobello* at 1046-7) The CEQ refused to criticize the *Roosevelt Campobello* holding in its subsequent discussion of the selection of alternatives in licensing and permitting situations. (48 Fed. Reg. 34263, 34266 (July 28, 1983); *see also Louisiana Wildlife Federation v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985))[4] Thus, while NEPA or CEQ regulations may not make a formal distinction between actions initiated by a

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4. As the *Louisiana Wildlife* and *Roosevelt Campobello* decisions demonstrate, the D.C. Circuit was hardly the first court to recognize that the goals of private project sponsors must be considered, or to use Petitioners' characterization, to "create a distinction between pure and hybrid federal actions." (Pet. 16)

federal agency and by private applicants, as a practical matter, the CEQ has acknowledged that the applicant's purposes and needs and the common sense realities of a given situation inevitably play a role in the definition of reasonable alternatives and project goals. Therefore, it was not improper for the FAA to consider the applicant's purposes here.

Petitioners contend that the D.C. Circuit Opinion creates a "subclass" of EISs for "hybrid federal actions". (Pet. 16) Petitioners claim that under the D.C. Circuit's decision, once the applicant states its preferred alternative, the feasibility of other possible alternatives become irrelevant. (*Id.* at 17) Nowhere in its decision does the D.C. Circuit go this far. At most, the D.C. Circuit merely acknowledged that the definition of goals must be shaped by the nature of the application at issue and the function the agency plays in the decision-making process the very considerations the CEQ has instructed should not be disregarded in developing alternatives.

To prohibit agencies from considering the goals and desires of a private project sponsor when defining the scope of alternatives to be studied would be to ignore reality and force an agency to consider alternatives that are simply not feasible. That kind of futile exercise is unnecessary under NEPA, as this Court and others have repeatedly acknowledged. (*E.g.*, *Vermont Yankee*, *supra*, at 435 U.S. at 551; *Crosby v. Young*, 512 F. Supp. 1363, 1373 (E.D. Mich. 1981))[5]

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5. Expounding on this point, this Court observed: "Common sense also teaches us that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative. . . .") (*Vermont Yankee*, *supra*, at 551) Similarly another Court has stated: "I cannot perceive of a more useless requirement than one that would require an agency to consider alternatives in detail that are not workable. . . ." *Crosby v. Young*, *supra*, at 1373)

Even if the D.C. Circuit opinion could be read to create a subclass of EISs composed of projects which are privately sponsored, as petitioners contend, that result would be of no consequence unless it resulted in a violation of the agency's duty to take a "hard look" at the environmental consequences of its action. (*Kleppe*, *supra*, 427 U.S. at 410 n. 21) In light of the record created by the FAA and reviewed by the Court below, there can be no doubt that a "hard look" occurred here.

II. The FEIS Discussion of Mitigation Complies with the Requirements of AAIA

Section 509 of the Airport and Airway Improvement Act of 1982 (AAIA) provides that the FAA shall not authorize a project which involves a major runway extension or runway location and which has a significant adverse environmental effect unless it first finds that all reasonable steps have been taken to minimize adverse effects. (49 U.S.C. app. § 2208(b)(5)). Petitioners contend that the FEIS' program of mitigation, as approved by the D.C. Circuit, did not meet that statutory requirement of the AAIA. (Pet. 22) Petitioners also ask that this Court substitute its judgment for that used by the FAA and require mitigation to be actually completed and/or fully funded prior to commencement of flight operations. (*Id.*) Such a substitution of judgment would be erroneous.

In reviewing the FEIS and ROD, a reviewing court considers "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment". (*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (citations omitted)). The D.C. Circuit's duty in this case was to determine whether the FAA committed a "clear error of judgment" when it determined that all "reasonable steps" had been taken. "Reasonable steps" is not defined in the AAIA. Therefore, as this Court stated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-844 (1984):

> [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[6] (emphasis added)

The D.C. Circuit found that the FAA's FEIS and ROD contained a full and complete discussion of the mitigation efforts that will be undertaken over a three-year period to bring the project within the government's established land use compatibility guidelines and that the FAA had obtained unequivocal assurances from the Port Authority that the efforts will be carried out. Briefly summarized, the FEIS describes the following mitigation commitments:

1. Acquisition of dwellings subjected to noise exceeding 75 L_{dn} and a portion of the dwellings within the 70-75 L_{dn} range and relocation of residents at an estimated cost of $10 million;
2. Acquisition and relocation of two nursing homes impacted by noise exceeding 75 L_{dn} at an estimated cost of $6.2 million;
3. The priority basis on which acquisition will occur;
4. Inclusion of a detailed relocation plan as a companion document to the FEIS;
5. A description of a sound attenuation program and noise and avigation easement purchase program recommended for dwellings in the 65-75 L_{dn} area, including the number of homes affected, the nature of attenuation efforts, and the mobile home and nursing homes excluded;
6. A description of typical sound attenuation improvements;

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6. *See Overton Park, supra*, 401 U.S. at 416 ("The court is not empowered to substitute its judgment for that of the agency.")

7. A discussion of the suitability of sound attenuation to the Toledo site;
8. A description of the alternative of noise and avigation easement acquisitions and the advantages of this alternative; and
9. Cost estimates for sound attenuation.

Reviewing the FEIS, the D.C. Circuit found that it contained a detailed and specific program of mitigation. (Pet. App. A [*D.C. Op.*] at 34a) The Court specifically found:

> [Mitigation] measures include buying out the owners of every private house and nursing home within range of more than L_{dn} 75 decibels, insulating doors and windows in homes subjected to noise between L_{dn} 70 and 75 decibels, and buying easements from the owners of homes within the reach of L_{dn} 65 to 70 decibels.

Likewise, the D.C. Circuit found that the FEIS and its supporting documents clearly reflected the Port Authority's commitment to undertake mitigation. (Pet. App. A [*D.C. Op.*] at 36a) The FEIS contains correspondence from the Port Authority's Director of Ports which assured the FAA that:

> The Toledo-Lucas County Port Authority is very sensitive to the need of establishing appropriate mitigation measures to accompany the development of an air cargo hub at Toledo Express Airport. The Port Authority wants to be as flexible as possible, in order to work with all local, state and federal interests. . . The Port Authority will take appropriate action within its powers to implement, with or without federal funds, the Mitigation measures identified in the final environmental impact statement for the establishment of an air cargo hub at Toledo Express. We are also prepared to provide for all local share funding portions of federal or state grants to be used to accomplish the mitigation.

> The Port Authority intends to comply with all applicable regulations regarding mitigation and will endeavor to accomplish the mitigation as expeditiously as possible.

(FEIS E-39) The FAA, thus, obtained a strong and unequivocal commitment from the Port Authority to complete mitigation. Moreover, as the D.C. Circuit found, the FAA will ensure that mitigation is carried out by imposing special conditions to that effect in its grant agreements. (Pet App. A [*D.C. Op.*] at 35a; FEIS at 4-31) Based on these findings, the D.C. Circuit properly held that the FAA reasonably concluded that a detailed mitigation plan, coupled with grounds to believe that the plan will be implemented, is enough of a 'reasonable step.'" (Pet. App. A [*D.C. Op.*] at 36a) The D.C. Circuit also concluded that the FAA did not commit a "clear error of judgment" and the "FAA has therefore met its obligations under the statute." (Pet. App. A [*D.C. Op.*] at 36a-37a)

The Petition does not allege that the mitigation program is inadequate or ineffective.[7] Petitioners assert that the FAA violated the AAIA because it did not require all mitigation, including the Part 150 Study, to be completed prior to commencement of flight operations. (Pet. 22) Petitioners also contend that the FAA violated the AAIA because it did not require the Port Authority to have assembled all funds necessary to implement the recommended mitigation measures and/or have a fixed timetable for completion of mitigation prior to commencement of flight operations. (*Id.*)

As stated by the D.C. Circuit, petitioners "read [sic] too much into . . . section 509(b)(5)." (Pet. App. A [*D.C.*

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7. If the cryptic and largely unintelligible footnote on p. 11 of the Petition is intended to assert that the FAA violated the DOT Act because it approved the cargo hub without adequately evaluating measures to mitigate the project's adverse effects, it should be disregarded. Petitioners did not address this point in their argument, so it must be considered waived.

Op.] at 36a) Significantly, petitioners do not cite a single case from any court requiring that mitigation be completed before service begins. The Ninth Circuit imposed such a requirement in one case, but that decision was reversed by this Court in *Robertson v. Methow Valley*, 490 U.S. 332 (1989). Petitioners seek to distinguish *Methow Valley* by arguing that this Court left open the issue of mitigation where there is a "substantive" statute requiring mitigation measures. The issue is not whether AAIA is a substantive statute since the District Circuit held the FEIS complied completely with the terms of AAIA.[8] The D. C. Circuit correctly noted that "Section 509(b)(5) does not order agencies to take all steps to lessen environmental trauma, just all reasonable ones. (Pet. App. A [*D.C. Op.*] at 36a)

The FAA has the statutory authority to determine that all reasonable steps have been taken to minimize adverse environmental effects before it authorizes a project under § 509(b)(5) of the AAIA. The mitigation plan contained in the FEIS is a detailed, comprehensive, three-year plan. In interpreting § 509(b)(5), the D.C. Circuit concluded that FAA's determination that a detailed mitigation plan combined with grounds to believe that the mitigation plan will be implemented constituted enough of a reasonable step for purposes of AAIA compliance, and that the FAA did not commit a clear error of judgment. (Pet. App. A [*D.C. Op.*] at 36a) Insofar as the D.C. Circuit properly determined that the FAA's mitigation determination was reasonable, it is unnecessary for this Court to review and reiterate the D.C. Circuit's holding.

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8. Petitioners give no citation for their claim at Pet. 20-21 that "the decision below holds, in effect, that "substantive" mitigation requirements are no different from "procedural" ones, and therefore robs substantive requirements of their action forcing character." The D. C. Circuit made no such holding but merely held that the FEIS complied with AAIA in full.

Petitioners' assertion that mitigation must be completed or fully funded before Burlington begins operations from Toledo is unreasonable because petitioners attempt to impose an environmental standard which exceeds the requirements of the AAIA. The statute requires completion of all reasonable steps prior to authorization of a project. By requiring completion of a detailed mitigation plan combined with assurances that the plan will be competed within a specified time frame, the FAA assured that all reasonable steps had been taken prior to authorizing the project to proceed. Requiring completion of mitigation prior to authorization of the project is unreasonable because it would have unnecessarily delayed the project for three years, despite Toledo and Burlington's compelling need for the hub which could not wait that length of time.

This Court in *Robertson v. Methow Valley*, stated: "[b]ecause NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures." (490 U.S. at 353 n.16) This language implies that where a statute does contain a substantive requirement, such as the AAIA, that requirement can be met where an agency has obtained assurances from third parties that particular measures will be implemented, as is true in this case.[9]

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9. In *Methow Valley*, this Court also cited statutes imposing substantive environmental obligations such as the Endangered Species Act (ESA). (490 U.S. at 351 n.14) An example of a substantive statute referred to by this Court was before the Ninth Circuit in *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984). The Fisheries Service in that case issued a final Biological Opinion, making several reasonable suggestions by which the Secretary could ensure that a proposed sale of oil leases did not jeopardize the continued existence of any endangered species. The court of appeals noted that the generality of the recommendations implied that the Secretary could choose the appropriate method after the lease sale. Nonetheless, the court held that the Secretary of the Interior did not abuse his discretion under the ESA by

The FEIS provides a detailed mitigation plan that will be implemented over a three-year period. Significantly, the Port Authority has already been informed by the FAA of an allocation of $7.4 million of Airport Improvement program discretionary grant funds that are available for use in property acquisitions and relocation assistance.[10] The mitigation is well underway. Actual implementation of mitigation demonstrates that the FAA reasonably relied on the Port Authority's commitment to implement the detailed mitigation plan contained in the FEIS and that the Port Authority's commitment satisfies the AAIA.

Petitioners also contend that the FAA violated the AAIA because it did not require completion of the Part 150 Noise Compatibility Study prior to commencement of flight operations. (Pet. 22) While the FAA did not require the Part 150 Study to be completed prior to commencement of flight operations, the Study was, in fact, completed and submitted to the FAA in August 1991 – a full month prior to commencement of Burlington's flight operations. The fact that the study is now

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Fn. 9 (*Cont.*)
deferring imposition of specific protections for endangered whales until after the proposed sale of oil leases.

In reaching its conclusion, the court noted that the Fisheries Service had reached an agreement with the Secretary providing for the continued monitoring activity after the lease sale and that the Secretary had placed special disclaimers in the Final Notice of Sale specifying "his continuing control of any post-sale drilling." (733 F.2d at 611) While appellants characterized these factors as "only a plan for later action", the court concluded that by choosing this plan, the Secretary recognized his obligation under the ESA to implement the plan. (*Id.*) Significantly, the court found that the monitoring agreement with the Fisheries Service would "help the Secretary take these steps and diligently pursue ESA compliance after the lease sale." (*Id.*)

10. This amount is an increase of approximately $2.6 million in FAA grant funds since this case was argued before the court below.

complete also shows that the FAA reasonably relied on the Port Authority's commitment to implement mitigation plans.

The D.C. Circuit properly concluded that "the Port Authority's Part 150 study will be detailed, as the law requires, and we do not think that the agency committed a 'clear error of judgment' in deciding to use the study to perfect the timing of an otherwise concrete proposal." (Pet. App. A [*D.C. Op.*] at 36a, *citing Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971))

A proper understanding of the function that this Study will serve in relation to the mitigation plan demonstrates that it was reasonable for the FAA to issue its ROD prior to completion of the Part 150 Study. The Part 150 Study is not the commitment to engage in mitigation or even the description of the nature of that mitigation. Those matters are included in the FEIS. Rather, the Part 150 Study is the document which fine-tunes the defined steps described in the FEIS that will actually be undertaken. As the court below found, the Part 150 Study "will help flesh out the details of the mitigation plans." (Pet. App. A [*D.C. Op.*] at 35a)

The D.C. Circuit properly concluded that "section 509(b)(5) does not order agencies to take all steps to lessen environmental trauma, just all reasonable ones." (Pet. App. A [*D.C. Op.*] at 36a (emphasis in original)). The court below properly held that the FAA has taken all reasonable steps and has met its obligations under the statute. Accordingly, review of this case by writ of certiorari is unwarranted.

CONCLUSION

For these reasons, the Petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully Submitted:

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November, 1991

APPENDIX

APPENDIX A

BURLINGTON
AIR EXPRESS

David L. Marshall
CHAIRMAN
CHIEF EXECUTIVE OFFICER

June 27, 1990

Mr. Peter A. Serini
Manager
Detroit Airports District Office
FEDERAL AVIATION ADMINISTRATION
Willow Run Airport, East
8820 Beck Road
Belleville, MI 40111

Dear Mr. Serini:

During the course of the Environmental Impact Statement (EIS) process in relation to the creation of a permanent air cargo hub at the Toledo Express Airport, I have had the opportunity to review comments submitted to the record by numerous parties. The purpose of this letter is to respond to comments submitted by Mr. Thomas E. Frank on May 15, 1990, which I have become aware of only this week, concerning discussions Burlington has held with the Fort Wayne-Allen County Airport Authority, and remarks attributed to me which appeared in the Fort Wayne Journal-Gazette on May 12, 1990. With this letter I intend to set the record straight that Burlington Air Express remains committed to the establishment and utilization of an air cargo hub at Toledo Express Airport.

Mr. Frank alleges that Burlington has a "standby second choice to Toledo", with those views apparently based on a newspaper article which suggested that Burlington would consider staying in Fort Wayne if it were unable to move to Toledo. Mr. Frank also stated that Burlington and Fort Wayne are "already actively dismissing Fort

Wayne as an alternative to Toledo." Apparently these statements are also based on the same newspaper article.

I wish to affirm for the record that Burlington Air Express does not have any existing viable alternative to the proposed new hub project in Toledo. Very simply, the Fort Wayne-Allen County Airport Authority has not been able to develop sources of financial support for the extensive airport improvements required in connection with our hub project. Specifically, Fort Wayne lacks the necessary aircraft parking ramp, fuel farm, related infrastructure and other airport improvements. Despite the continuing good will of the Fort Wayne airport management, funding for these improvements has not been achievable in Fort Wayne. On the other hand, adequate funding and planning for this major project has been created in Toledo with the assistance of the Toledo-Lucas County Port Authority. There are other very important reasons for our need to relocate to Toledo, including location closer to our primary market, the existence of a preferred highway network and the availability of an expanded labor pool. These factors, together with the lack of financial support for the project in Fort Wayne, lead to the necessary decision to relocate to Toledo.

Burlington's recent discussions with Fort Wayne have related to a temporary extension of our existing hub agreement pending completion of the delayed Toledo project. Throughout those discussions with Fort Wayne, Burlington maintained very openly its continued commitment to its permanent hub facility Toledo.

As Chief Executive Officer of Burlington Air Express I am pleased to re-affirm for the record that our company is absolutely counting on the new Toledo hub as the most critical element in our future operating plan. For an air cargo company, its hub is its heart in every sense. We are facing "heart transplant surgery" and I cannot over-stress how fundamental it is for the future of our company that our new hub in Toledo be developed, completed and operated as set forth in the Environmental Impact Statement.

Sincerely,

/s/

David L. Marshall

DLM/tp

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

CITIZENS AGAINST
BURLINGTON, INC.
et al.
Petitioners,

v.

JAMES BUSEY,
Administrator,
Federal Aviation
Administration
Respondent.

No. 90-1373

AFFIDAVIT OF DAVID L. MARSHALL

I, David L. Marshall, Being duly sworn, depose and state:

1. I am the Chairman of Burlington Air Express, Inc. ("Burlington").

2. When I received Mr. Koslosky's letter dated April 25, 1990 (Petitioners' Exhibit J) I responded with a letter dated May 2, 1990 (Petitioners' Exhibit M). In my letter I stated as follows:

> "Burlington remains committed to the Toledo project in exactly the same manner as you and I discussed last February, though the necessary 'kick-off' time for this major event has now drawn much closer. There are many risks ahead, and there continue to be major uncertainties. In this environment, I remain deeply grateful for the continuing support of the Fort Wayne/Allen County Airport Authority and for your own leadership. I accept the spirit and purpose of your letter, and I want to assure you that

I will look to Fort Wayne for support and solutions as and if our Toledo commitment is altered by any of the risks or uncertainties that lie ahead." (Emphasis added.)

3. Those statements were true when written and are still true today. Burlington was and is "deeply grateful for the continuing support of the Fort Wayne/Allen County Airport Authority" in extending the Burlington lease and thus allowing Burlington to remain at Fort Wayne for 15 months pending the development of the Toledo project. By the same token Burlington may need a further extension of its Fort Wayne lease in the event of further delays and thus would have to "look to Fort Wayne for support and solutions as and if our Toledo commitment is altered by any of the risks or uncertainties that lie ahead."

4. Mr. Koslosky's letter of April 25, 1990 (Petitioners' Exhibit J, p.3) also indicated that financing might be available for a permanent Burlington hub at Fort Wayne. Burlington's prior dealings with Fort Wayne gave Burlington no reason to believe that the hopeful statements in the April 25, 1990 letter reflected a dramatic change in the existing situation in Fort Wayne. Nevertheless, I took this letter very seriously. I believed it highly desirable to maintain the good relationships which had facilitated the previous lease extension covering Burlington's temporary hub. As a matter of courtesy and prudent due diligence, therefore, I instructed Glen Beecher to meet with the Fort Wayne Authorities which he did with the results described in Glen Beecher's Affidavit (Burlington's Exhibit C). As stated in Beecher's Affidavit those meetings and conversations took place after my letter of May 2, 1990. They confirmed the prior situation, i.e., that there was no viable financial plan in prospect for establishing a permanent hub and related airport improvements at Fort Wayne.

5. My letter to the FAA dated June 27, 1990, which is attached to the ROD, was written after those meetings and correctly confirmed that no viable alternative had been developed for a permanent hub at Fort Wayne. The statements in my letter dated May 2, 1990, to Mr. Koslosky and my letter to the FAA dated June 27, 1990, are both true and are mutually consistent.

6. There is also no basis in fact for the Petitioners' claim (p.9) that "Burlington itself says it can even accommodate a project cancellation by remaining in Fort Wayne Pet. Ex. M." As indicated at length in Burlington's Answer, pp.1-8, Petitioners confuse the possibility of remaining at Fort Wayne temporarily – which might be accomplished with the continuing goodwill and support of the Fort Wayne Airport Authority, albeit at a great cost – with establishing a permanent hub at Fort Wayne which is not feasible for the reasons set forth in my letter to the FAA dated June 27, 1990.

7. The top of Petitioners' Exhibit M indicates that it was faxed to them by "FWAC Airport Authority," i.e., the Fort Wayne Allen County Airport Authority. It is therefore significant that Petitioners' Reply contains nothing which refutes or even takes issue with Glen Beecher's Affidavit stating that Fort Wayne never offered "any specific package for the financing of a permanent hub facility at Fort Wayne" and that Burlington would be faced with significant environmental issues at Fort Wayne (Exhibit C to Burlington's Answer).

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 31, 1990

/s/
David L. Marshall